163 U.S. 118

TRANSCRIPT OF RECORD.

163-118

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 863.

MARTHA BARNITZ, PLAINTIFF IN ERROR,

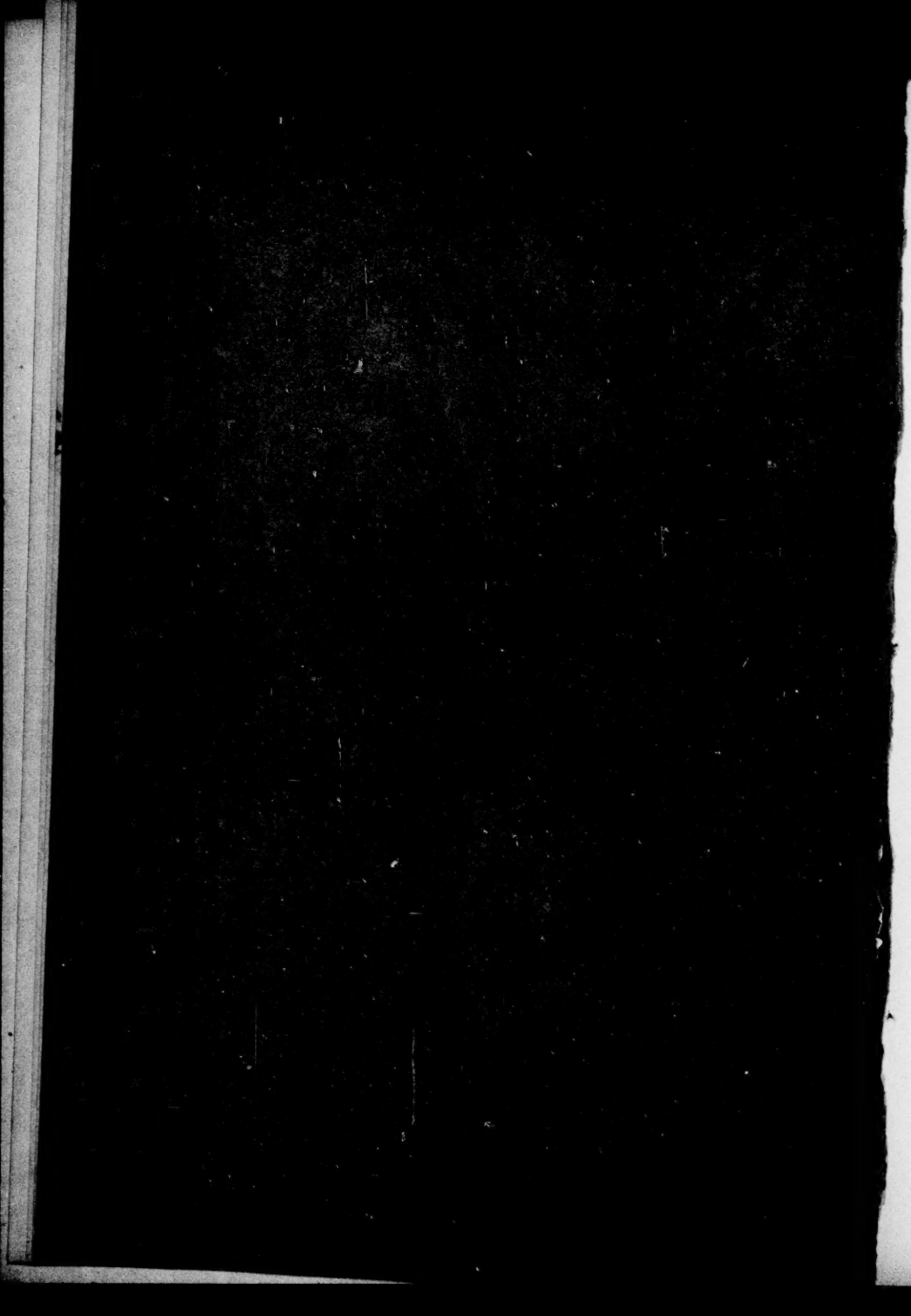
vs.

JOHN L. BEVERLY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JANUARY 20, 1896.

(16,153.)



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1 In the Supreme Court of the United States of America.

MARTHA BARNITZ, Plaintiff in Error,
v.
JOHN L. BEVERLY, Defendant in Error.

Assignments of Error.

Of the October term, in the year of our Lord one thousand eight hundred and ninety-five.

Comes now the said Martha Barnitz, the plaintiff in error herein, by her attorneys, and says that in the record and proceedings in the cause above entitled there is manifest error in this, to wit:

1st. The court erred in holding that chapter 109 of the Laws of the State of Kansas of 1893, relating to the sale and redemption of real estate, which took effect March 17th, 1893, determined the form of judgment and the remedy to which this defendant in error was entitled in the foreclosure of a mortgage executed November 1st, 1885.

2nd. The court erred in holding that said chapter 109 of the Laws of the State of Kansas of 1893 is not in violation of that portion of section ten, article one, of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts" as applied to mortgages executed prior to the passage of said chapter 109.

3rd. The court erred in holding that said chapter 109 of the Laws of the State of Kansas of 1893 applies to mortgage contracts
2 executed before the passage of said chapter 109, and in depriving the defendant in error, Martha Barnitz, of the benefit of that portion of section ten, article one, of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts."

4th. The court erred in rendering judgment against said defendant in error reversing the decision of the district court of Shawnee county, Kansas, and commanding that court to direct the issue to the purchaser of the real estate involved of a certificate of purchase entitling the plaintiff in error herein to redeem from such sale in accordance with the provisions of said chapter 109, when it should have rendered a judgment affirming the judgment of said district court.

Wherefore the said Martha Barnitz prays that the judgment and decision of the supreme court of the State of Kansas rendered and given in said cause on the seventh day of December, A. D. 1895, be reversed and annulled, and that the former decision of said court in said cause and the decision and judgment of the district court of Shawnee county, Kansas, in said cause may be affirmed and approved by this court, and that this court may hold and determine that chapter 109 of the Laws of the State of Kansas of 1893 is not applicable to the contract involved in this action; and that said

plaintiff in error may be granted such other and further relief in the premises as to this court shall seem meet and proper.

LEONARD S. FERRY,
THOMAS F. DORAN,
Attorneys for Plaintiff in Error.

D. M. VALENTINE,
A. A. GODARD,
Of Counsel.

3 [Endorsed:] 9770. In — court. No. —. —— *vs.* ——. Valentine, Godard & Valentine, Real Estate building, Topeka, Kas., attorneys for —— ——.

4 In the Supreme Court of the State of Kansas.

JOHN L. BEVERLY, Plaintiff in Error,
vs.
MARTHA BARNITZ, Defendant in Error.

Be it remembered that on the 3rd day of May, 1894, there was filed in the office of the clerk of the supreme court of the State of Kansas the petition in error in the above-entitled case, on which was endorsed the precipe for summons in error and to which was attached a case made from the district court of the county of Shawnee, Kansas, all of which are in words and figures as follows, to wit:

5 In the Supreme Court of the State of Kansas.

JOHN L. BEVERLY, Plaintiff in Error,
vs.
MARTHA BARNITZ, Defendant in Error.

Petition in Error.

The said John L. Beverly, plaintiff in error, complains of the said Martha Barnitz, defendant in error, for that the said Martha Barnitz, at a regular term of the district court held in and for the county of Shawnee, State of Kansas, on the 26th day of February, A. D. 1894, obtained and recovered a certain final order by the consideration of said court against the said plaintiff in error in a certain action then pending in said court, wherein the said Martha Barnitz was plaintiff and the said John L. Beverly and others were defendants, a copy of the record of said order and proceedings in which case, duly certified, is hereto attached and made a part of this petition.

And the said plaintiff in error avers that there is error in said record and proceedings in this, to wit:

First. That the said court erred in overruling the motion of said plaintiff in error for an order of said court adjudging and determining that the real estate sold by the sheriff of Shawnee county on

the 12th day of February, 1893, was subject to redemption, as provided by chapter 109 of the Laws of 1893.

Second. That the said court erred in overruling the motion made by the plaintiff in error that said sheriff be ordered and directed to make to the purchaser at said sale the certificate of sale mentioned and prescribed by chapter 109 of the Laws of 1893.

Third. That said court erred in holding that said chapter 109 of the Laws of 1893, relating to the sale and redemption of real estate, is unconstitutional so far as it is intended to apply to mortgages previously executed and delivered.

Fourth. That said court erred in holding that said defendant, John L. Beverly, was not entitled to any right of redemption under said chapter 109 of the Laws of 1893, for the reason that the mortgage foreclosed in said action was executed and delivered prior to the enactment of said law.

Fifth. That the said court erred in ordering the immediate execution and delivery of a sheriff's deed to the purchaser at said sale.

Sixth. That the said court erred in ordering that the possession of said property so sold be delivered to the purchaser at said sale.

Wherefore the said plaintiff in error prays that the said order may be reversed and the said plaintiff in error be restored to all things he has lost by reason thereof.

E. A. McMATH,
Attorney for Plaintiff in Error.

Precipe.

The clerk will please issue summons in error, directed to the sheriff of Shawnee county, for service on Ferry & Doran, attorneys for defendant in error.

May 2nd, '94.

E. A. McMATH,
Att'y for Pl'ff in Error.

Filed May 3rd, 1894.

C. J. BROWN,
Clerk Supreme Court.

6 *Case Made.*

Be it remembered that heretofore, to wit, on the 21st day of January, A. D. 1893, one Martha Barnitz, as plaintiff, commenced an action in the district court in and for the county of Shawnee, in the State of Kansas, against George A. Kirkland, John L. Beverly, and others, as defendants, by filing in said court a petition and bond for costs and causing a summons thereon to be issued against the defendants named in said petition; which said petition was in the words and figures following, to wit:

Petition.

In the District Court of Shawnee County, Kansas.

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, THOMAS COONEY, BETSY COONEY, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka (a Corporation), The City of Topeka, Wm. Fairchild, A. M. Fuller, E. A. Barber, John L. Beverly, W. F. Monteith, R. Riblet, A. W. Pliley, L. W. Lawrence, H. C. Campbell, and Hurly Baldy, Defendants.

Now comes said plaintiff and complains of said defendants, and alleges that the city of Topeka and the American Bank of North Topeka are corporations duly organized and existing under and by virtue of the laws of the State of Kansas.

1. For her first cause of action against said defendants, said plaintiff alleges that on the 1st day of November, 1885, the said defendant, George A. Kirkland, executed and delivered to plaintiff his certain promissory note in writing of that date, whereby, for value received, he promised to pay to the order of plaintiff in five years after the date thereof the sum of fifteen hundred dollars ($1,500.00), with interest thereon at the rate of eight per cent. per annum until maturity, and at the rate of twelve per cent. per annum after maturity until paid. No part of said note has been paid, although the same has by its terms long since become due and payable, and there remains due and unpaid on the same the sum of fifteen hundred dollars ($1,500.00), with interest thereon, at the rate of twelve per cent. per annum, from the 1st day of November, 1890. A copy of said note is attached hereto, marked "Exhibit A," and made a part of this petition.

2. For her second cause of action against said defendant-, said plaintiff alleges that on the first day of November, 1885, said defendant, George A. Kirkland, executed and delivered to plaintiff his certain promissory note in writing of that date, whereby, for value received, he promised to pay to the order of said plaintiff, on the first day of November, 1890, the sum of sixty dollars ($60.00), with interest thereon, at the rate of twelve per cent. per annum, after due until paid. No part of said sum has been paid, although the same, by the terms of said note, has long since become due and payable, and there remains due and unpaid upon the same
7 the sum of sixty dollars ($60.00), with interest thereon, at the rate of twelve per cent. per annum, from the 1st day of November, 1890. A copy of said note is hereto attached, marked "Exhibit B," and made a part of this petition.

3. For a third and further cause of action against said defendants, said plaintiff alleges that on the first day of November, 1885, said defendant, George A. Kirkland, in any by virtue of the terms of a certain mortgage hereinafter more particularly described, executed

and delivered by said George A. Kirkland to said plaintiff on the first day of November, 1885, and at the same time and as a part of the same transaction with said notes hereinbefore described, promised and agreed with said plaintiff to pay the taxes on the premises described in said mortgage, to wit, the northeast quarter (¼) of section number twelve (12), township number ten (10) south, of range number twelve (12) east, of the sixth (6th) principal meridian, in Shawnee county, Kansas; and further promised that if said taxes were not paid, then said plaintiff might pay said taxes and the same should be a lien on the premises aforesaid and should be secured by said mortgage and collected in the same manner as the principal debt secured thereby, with interest thereon at the rate of twelve per cent. per annum.

Plaintiff further alleges that the taxes levied and assessed against said premises for the years 1890 and 1891 were not paid by said defendant or by any person or persons for him, and that said plaintiff has paid said taxes, amounting to the sum of $48.25, which sum is due plaintiff from said defendants, with interest thereon, at the rate of twelve per cent. per annum, from the 21st day of January, 1893.

Plaintiff further alleges that, for the purpose of securing the payment of said notes and sums of money hereinbefore referred to and the sums to become due thereon, the said defendant, George A. Kirkland, on the first day of November, 1885, executed and delivered unto the said Martha Barnitz, this plaintiff, his certain mortgage deed in writing of date that day, and thereby did grant, bargain, sell, and convey unto said plaintiff, her heirs, executors, administrators, and assigns, all the following real estate, situated in the county of Shawnee and State of Kansas, to wit, the northeast quarter (¼) of section number twelve (12), township number ten (10) south, of range number twelve (12) east, of the sixth (6th) principal meridian; that said mortgage deed contained certain conditions providing in substance that said mortgage should be void if the said George A. Kirkland should pay the sums of money, with interest thereon agreed to be paid, according to the tenor and effect of the notes described in said mortgage, the same being the notes hereinbefore set out, and should pay to said plaintiff any taxes that may have been paid by her on said premises, with interest thereon, at the rate of twelve per cent. per annum, from the time the said sums of money may have been paid until the same should be repaid. Further, that if said George A. Kirkland failed to pay the legal holder of said notes any of the principal sum payable thereby or any installment of interest thereon when the same should become due and payable, or should fail to repay to the legal holder of said notes any sum of money paid by her for taxes and assessments, with the interest thereon as aforesaid, then the whole of the debt secured by said mortgage should become immediately due and payable at the option of the legal holder of said notes and mortgage, and the legal holder of said notes and mortgage should be at once entitled to the possession of said premises and receive the rents and profits thereof; that said George A. Kirk-

land or any person or persons for him have failed and neglected to pay said notes, although the same by their terms
8 have long since become due and payable, and have failed and neglected to pay the taxes levied and assessed against said premises for the years 1890 and 1891, but have made default, which default has continued to this day; that plaintiff is the legal holder of said notes; that said mortgage deed was duly filed for record in the office of the register of deeds in and for said county of Shawnee, in the State of Kansas, on the 9th day of November, A. D. 1885, at 2.01 o'clock p. m. of said day, and was duly recorded on the same day in volume 113, at page 143; further, that the said George A. Kirkland in and by the terms of said mortgage expressly waived all appraisement and stay laws of the State of Kansas; that by reason of the default as aforesaid made in the payment of said indebtedness, the conditions of said mortgage have been broken and said mortgage deed has become absolute. A copy of said mortgage is hereto attached, marked "Exhibit C," and made a part of this petition.

That there is now due to the said plaintiff on said indebtedness, notes, and mortgage the sum of fifteen hundred and sixty dollars ($1,560.00), with interest thereon, at the rate of twelve per cent. per annum, from the first day of November, 1890, and the further sum of forty-eight dollars and twenty-five cents ($48.25), with interest thereon, at the rate of twelve per cent. per annum, from the 21st day of January, 1893.

That said defendants, George A. Kirkland, R. Riblet, W. F. Monteith, A. W. Pliley, L. W. Lawrence, H. C. Campbell, John L. Beverly, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka, Thomas Cooney, Betsy Cooney, The City of Topeka, Wm. Fairchild, A. M. Fuller, E. A. Barber, and Hurly Baldy, claim some estate or interest, lien or claim, upon said premises, the exact nature and extent of which is to this plaintiff unknown; but this plaintiff alleges that whatever said estate or interest, lien or claim, may be, the same is inferior, subsequent, and void as to the lien and claim of this plaintiff. Plaintiff further alleges that said defendants, R. Riblet, W. F. Monteith, A. W. Pliley, L. W. Lawrence, H.C. Campbell, and John L. Beverly, since the execution of said mortgage became the owners successively of said premises by virtue of successive warranty deeds executed and delivered to them respectively, and that in and by virtue of the terms of said deeds said last-mentioned defendants successively assumed and agreed to pay the mortgage and the sums of money to become due thereon as hereinbefore referred to.

Wherefore said plaintiff prays judgment against said defendants, George A. Kirkland, R. Riblet, W. F. Monteith, A. W. Pliley, L. W. Lawrence, H. C. Campbell, and John L. Beverly, for the sum of fifteen hundred and sixty dollars ($1,560.00), with interest thereon, at the rate of twelve per cent. per annum, from said 1st day of November, 1890, and for the further sum of forty-eight dollars and twenty-five cents ($48.25), with interest thereon, at the rate of twelve

per cent. per annum, from the 21st day of January, 1893, and for costs of suit.

That said mortgage deed may be foreclosed; that the lien, claim, interest, estate, and equity of redemption of all the said defendants herein mentioned and each and all of them, if any they have, in and to said premises may be determined and settled, and that said plaintiff may be adjudged to have a first lien and claim on said premises; that said mortgaged premises may be ordered to be sold according to law, without appraisement, and the proceeds arising from said sale applied to the payment of said indebtedness due said plaintiff, and that said defendants and each of them
9 may be forever barred and foreclosed of and from all right, title, estate, interest, property, and equity of redemption in or to said premises or any part thereof, and that said plaintiff may have such other and further relief as shall be agreeable to equity and good conscience.

FERRY & DORAN,
Attorneys for Plaintiff.

EXHIBIT A.

No. 239. $1,500.

First-mortgage Real-estate Note Negotiated by the Investment Banking Co., Topeka, Kansas.

For value received I promise to pay to the order of Martha Barnitz fifteen hundred dollars, lawful money of the United States, five years after the date hereof, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of May and November in each year, according to the tenor of ten interest coupons for sixty dollars each, hereto annexed and bearing even date herewith, said principal and interest being payable at Gettysburgh National bank, Gettysburgh, Pa. It is expressly declared and agreed that this note and the coupons hereto attached are made and executed under and are to be construed by the laws of the State of Kansas in every particular and are given for an actual loan of fifteen hundred dollars.

This note and these coupons are to draw twelve per cent. interest per annum after maturity and are secured by a mortgage of even date herewith on real estate. Dated at Topeka, Kansas, the 1st day of November, A. D. 1885.

GEORGE A. KIRKLAND.

Appraisement waived.
Attest: R. R. BERTRAND.
W. H. TRUE.

EXHIBIT B.

No. 10. *Coupon Number Ten.* $60.

On the first day of November, 1890, I promise to pay to the order of Martha Barnitz sixty dollars, at Gettysburg National bank, Pa.,

with interest after maturity at the rate of twelve per cent. per annum, this coupon being for six months' interest on my note of $1,500. Appraisement waived.

Dated Topeka, Kansas, November 1st, A. D. 1885.

GEORGE A. KIRKLAND.

10 "EXHIBIT C."

Mortgage.

Long form, with interest, tax, insurance, attorney's fees, waiver of appraisement, assignment, receipt, etc.

This indenture, made this first day of November, in the year of our Lord one thousand eight hundred eighty-five, by and between George A. Kirkland, an unmarried man of the county of Pottawatomie and State of Kansas, party of the first part, and Martha Barnitz, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen hundred dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, all of the following-described tract, piece, or parcel of land, lying and situate in the county of Shawnee and State of Kansas, to wit: The northeast quarter (¼) of section No. twelve (12), township No. ten (10), south, range No. twelve (12) east of the sixth principal meridian, Shawnee county, Kansas, according to the United States survey thereof.

To have and to hold the same, with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all rights of homestead exemption, unto the said party of the second part, and to his heirs and assigns, forever. And the said party of the first part does hereby covenant and agree, that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that he will warrant and defend the same in the quiet and peaceable possession of said party of the second part, his heirs and assigns, forever, against the lawful claims of all persons whomsoever.

11 Provided always, and this instrument is made, executed and delivered upon the following conditions, to wit:

First. Said George A. Kirkland is justly indebted unto the said party of the second part in the principal sum of fifteen hundred dollars, lawful money of the United States of America, being for a loan thereof, made by the said party of the second part to the said George A. Kirkland and payable according to the tenor and effect of one certain first-mortgage real-estate note, numbered 239, executed and delivered by the said George A. Kirkland, bearing date November 1st, 1885, and payable to the order of the said Martha

Barnitz five years after date at Gettysburg National bank, Gettysburg, Pa., with interest thereon from date until maturity at the rate of 8 per cent. per annum, payable semi-annually, on the 1st days of May and November in each year, and 12 per cent. per annum after maturity, the installments of interest being further evidenced by ten coupons attached to said principal note, and of even date therewith, and payable to the order of said Martha Barnitz at Gettysburg National bank, Gettysburg, Pa.

Second. Said party of the first part hereby agree- to pay all taxes and assessments levied upon said premises when the same are due, and insurance premiums for the amount of insurance hereinafter specified, and if not so paid the said party of the second part or the legal holder or holders of this mortgage, may, without notice, declare the whole sum of money herein secured due and payable at once, or may elect to pay such taxes, assessments and insurance premiums, and the amount so paid shall be a lien on the premises aforesaid and be secured by this mortgage, and collected in the same manner as the principal debt hereby secured, with interest thereon at the rate of 12 per cent. per annum, but whether the legal holder or holders of this mortgage elect to pay such taxes, assessments, or insurance premiums or not, it is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to immediate possession of the premises, and the rents, issues and profits thereof.

Third. Said party of the first part hereby agrees to keep all buildings, fences and other improvements upon said premises in as good repair and condition as the same are in at this date, and abstain from the commission of waste on said premises until the note hereby secured — fully paid.

Fifth. Said party of the first part hereby agrees that if the maker of said note shall fail to pay, or cause to be paid, any part of said money, either principal or interest, according to the tenor and effect of said note and coupons, when the same becomes due, or to conform to or comply with any of the foregoing conditions or agreements, the whole sum of money hereby secured shall, at the option of the legal holder or holders hereof, become due and payable at once, without notice.

And the said party of the first part, for said consideration, does hereby expressly waive an appraisement of said real estate, and all benefit of the homestead, exemption and stay laws of the State of Kansas.

The foregoing conditions being performed, this conveyance to be void; otherwise of full force and virtue.

Sixth. In case of default of payment of any sum herein covenanted to be paid, for the period of thirty days after the same becomes due, or in default of performance of any covenant herein contained, the said first party agree- to pay to the said second party and his assigns, interest at the rate of 12 per cent. per annum, computed annually on said principal note, from the date thereof to the time when the money shall be actually paid. Any payments made on account of interest shall be credited in said computation so that the

total amount of interest collected shall be, and not exceed, the legal rate of 12 per cent. per annum.

In testimony whereof, the said party of the first part has hereunto subscribed his name and affixed his seal, on the day and year above mentioned.

GEORGE A. KIRKLAND. [SEAL.]

Executed and delivered in presence of—

R. R. BERTRAND.
W. H. TRUE.

12 STATE OF KANSAS, } *ss:*
Pottawatomie County, }

Be it remembered that on this seventh day of November, A. D. eighteen hundred and eighty-five, before me, the undersigned, a notary public in and for said county and State, came George A. Kirkland, an unmarried man, who is personally known to me to be the identical person described in and who executed the foregoing mortgage deed, and duly acknowledged the execution of the same to be his voluntary act and deed.

In witness whereof I have hereunto subscribed my name and affixed my official seal on the day and year above last written.

[NOTARIAL SEAL.] R. R. BERTRAND,
Notary Public,—— County, Kansas.

Com. expires Feb. 15, 1886.

13 [Endorsed:] Mortgage. From George A. Kirkland to Martha Barnitz. $1,500, due November 1st, 1890. State of Kansas, Shawnee county, *ss.* This instrument was filed for record on the 9 day of Nov., A. D. 1885, at 2.01 o'clock p. m., and duly recorded in Book 113, on page 143. Fee, $2.00, p'd. A. Parker, register of deeds. Seal.

[Endorsed:] No. —. Martha Barnitz, plaintiff, *vs.* George A. Kirkland *et al.*, defendants. Petition. Filed Jan. 21, 1893. S. M. Gardenhire, clerk dist. court. Ferry & Doran, att'ys for plaintiff.

14 And afterwards service of summons in said action was duly made upon the defendant John L. Beverly and upon each and all of the other defendants in said action, as more fully appears in the journal entry of judgment hereinafter set forth.

That afterwards, to wit, on the 23rd day of February, 1893, the defendant John L. Beverly filed his answer in said action; which answer was in the words and figures following, to wit:

Answer.

In the District Court of Shawnee County, State of Kansas.

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, THOMAS COONEY, BETSY Cooney, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka (a Corporation), The City of Topeka, William Fairchild, A. M. Fuller, E. A. Barber, John L. Beverly, W. F. Monteith, R. Riblet, A. W. Pliley, L. W. Lawrence, H. C. Campbell, and Hurly Baldy, Defendants. } No. 14525.

Answer—John L. Beverly.

Now comes John L. Beverly and, for his answer to the petition of the plaintiff filed herein, says for a first defense thereto—

That he denies each and every material allegation contained in the plaintiff's said petition.

For a second defense to said petition this defendant says that he has paid to the plaintiff the amount due on said principal note and interest coupon attached, and that the interest and principal of said note are fully paid.

For a further and third defense this defendant says that he is the owner of the property described in the mortgage described in the plaintiff's petition, and has been such owner for several years last past; that he was in 1891 and in 1892 and during all the period covered by said years in the actual possession of said property, and that he turned over to the plaintiff the said property to use, and that the plaintiff took possession thereof and has had the use and benefits thereof and has had all the rents and profits thereof, and that plaintiff has received in benefit for the use, rents, and profits thereof the sum of $1,500.00.

Wherefore this defendant prays judgment for his costs.

GUNN & McNARY,
Att'ys for J. L. Beverly.

The defendants Thomas Cooney and Betsy Cooney appeared by E. N. Gunn, Esq., their attorney, and filed a disclaimer of any interest in the property described in the petition, and none of the other defendants, except Beverly, filed any answer or plea to said petition or in any manner contested the claims of the plaintiff in said cause.

That afterwards, to wit, on the first day of March, 1893, the said plaintiff duly filed in said court her reply to the said answer of the defendant John L. Beverly; which reply was in the words and figures following, to wit:

Reply.

In the District Court of Shawnee County, Kansas.

MARTHA BARNITZ, Plaintiff,
vs.
15 GEORGE A. KIRKLAND, THOMAS COONEY, *et al.*, Defendants.

Comes now said plaintiff, and for her reply to the second and third pretended defenses of defendant John L. Beverly in his answer filed herein, denies each and every material allegation therein contained that is inconsistent with the allegations in plaintiff's petition.

Wherefore plaintiff prays judgment as asked for in her said petition.

FERRY & DORAN,
Att'ys for Plaintiff.

And afterwards, to wit, on the 7th day of July, A. D. 1893, the said cause duly came on for trial before the said court, Hon. Z. T. Hazen, judge of said court, being present and presiding, and the said defendant, John L. Beverly, duly appearing by his attorneys, Gunn & McNary and E. A. McMath, and the said plaintiff appearing by her attorneys, Ferry & Doran. Said parties in open court and with the consent of the court duly waived a jury and submitted the said cause to the court. The court, having heard the evidence and the arguments of counsel and being fully advised in the premises, did find that the allegations in plaintiff's petition contained were true, except as to the personal liability of said John L. Beverly for the said mortgage debt, as to which the court did find in favor of the defendant John L. Beverly that he was not liable for the said mortgage debt, and the court did thereupon order and award judgment in favor of the plaintiff and against the defendants.

The proceedings on which said trial and the findings and judgment of the court therein are fully set forth in the journal entry, which was in the words and figure- following, to wit:

Journal Entry.

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, THOMAS COONEY, BETSY Cooney, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka, a Corporation; William Fairchild, A. M. Fuller, E. A. Barber, John L. Beverly, W. F. Monteith, R. Riblet, A. W. Pliley, L. W. Lawrence, H. C. Campbell, and Hurly Baldy, Defendants. } No. 14525.

And now, on this 7th day of July, 1893, comes the said plaintiff, by Ferry & Doran, her attorneys, and comes also said defendant,

John L. Beverly, by Gunn & McNary and E. A. McMath, his attorneys, and come also said defendants, Thomas Cooney and Betsy Cooney, by E. N. Gunn, their attorney, and thereupon said plaintiff shows to the court that the said defendants, Thomas Cooney and Betsy Cooney, The American Bank of North Topeka, a corporation; The City of Topeka, John L. Beverly, W. F. Monteith, R. Riblet, and H. C. Campbell, have been duly informed of the commencement of this action by having been personally served with summons herein, and that the said defendants, H. J. Martin, Sr., E. A. Barber, A. M. Fuller, William Fairchild, Crissie H. Kirk, and Hurly Baldy, have duly entered their appearance in the above-entitled action, thereby waiving the issue and service of summons upon
16 them herein, and thereupon said plaintiff in open court and with the consent of the court dismisses said action without prejudice as to said defendants, George A. Kirkland, A. W. Pliley, and L. W. Lawrence, and the court, having examined the proofs of service as aforesaid, finds that the said defendants and each of them having been dult notified of the commencement of this action in the manner prescribed by law, except said defendants, H. J. Martin, Sr., E. A. Barber, A. M. Fuller, William Fairchild, Hurly Baldy, and Crissie H. Kirk, who have duly entered their appearance herein, thereby waiving the issue and service of summons upon them.

And the court finds that said defendants and each of them, except defendants John L. Beverly, Thomas Cooney, and Betsy Cooney, have failed to demur to, answer, or plead in any manner to said petition and have made default, and thereupon this action came duly on to be heard on the petition of the plaintiff, the disclaimer of said defendants, Thomas Cooney and Betsey Cooney, the answer of defendant John L. Beverly, and the reply of plaintiff thereto, and the said parties in open court and with the consent of the court waive a jury herein and submit this cause to the court; and the court, having heard the evidence and the arguments of counsel and being fully advised in the premises, finds that the allegations in plaintiff's petition contained are true, except as to the personal liability of said John L. Beverly for said mortgage debt, as to which the court finds in favor of the defendant John L. Beverly, and that there is now due to said plaintiff from the said defendants, R. Riblet, W. F. Monteith, and H. C. Campbell, on the causes of action set forth in plaintiff's petition, the sum of two thousand one hundred and thirteen and $\frac{46}{100}$ dollars, which sum draws interest at the rate of twelve per cent. per annum.

And the court further finds that the said plaintiff has a first lien upon the mortgaged premises described in her petition for the payment of the whole sum found due to her, with interest.

And the court further finds that the said defendants, George A. Kirkland, A. W. Pliley, and L. W. Lawrence, have long since conveyed, by good and sufficient warranty deeds, any interest that they had in said real estate described in plaintiff's petition.

Wherefore it is considered, ordered, and adjudged by the court that the said plaintiff have and recover of and from defendants R.

Riblet, W. F. Monteith, and H. C. Campbell judgment for the sum of two thousand one hundred and thirteen dollars and $\frac{46}{100}$, so as aforesaid found due, with interest thereon from this date at the rate of twelve per cent. per annum, and the costs of this action, taxed at $44.95.

It is further ordered and decreed by the court that in case the said defendants fail for six months from this date to pay to the said plaintiff the several sums of money found due as aforesaid to her, with interest due and to become due thereon as aforesaid, and the costs of this action, an order issue to the sheriff of Shawnee county, commanding him to cause the lands and tenements in said petition described, to wit, the northeast quarter of section twelve (12), township ten (10) south, of range twelve (12) east, of the sixth (6) principal meridian, in the county of Shawnee and State of Kansas, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, to be advertised and sold without appraisement in the manner prescribed by law, and apply the proceeds arising from such sale in the payment of, first, the costs and accruing costs of this action; second, the judgment in favor of this plaintiff, with accruing interest thereon, and the surplus, if any,
17 shall be brought into court for the further order of the court for the equitable distribution by the court. It is further adjudged and decreed by the court that the said defendants and each of them and all persons claiming or to claim by, through, or under them or any of them, upon the confirmation of any sale of said lands and tenements hereunder and upon execution and delivery of the sheriff's deed therefor, according to law, be barred and forever foreclosed of all title to, lien upon, or equity of redemption in said lands and tenements or any part thereof, and that upon confirmation of any sale made as herein provided and upon execution and delivery of the sheriff's deed therefor, as provided by law, the sheriff be directed to put the purchaser of said lands and tenements into possession thereof, provided that this judgment shall operate in conformity to the decision of the Supreme Court as to the application of the mortgage redemption laws of March, 1893.

(Signed) Z. T. HAZEN, *Judge.*

And afterwards, to wit, on the 9th day of January, A. D. 1894, at the request of the said plaintiff, an order of sale was issued out of the office of the clerk of said court in the said cause for the sale of the property described in the said petition to the sheriff of the said county of Shawnee, which said order of sale was thereafter, to wit, on the 16th day of February, 1894, duly returned and filed in said office of the clerk of said court, with the return of the said sheriff, showing his proceedings thereon; which said order of sale and sheriff's return were in the words and figures following (except the proof of publication of the sheriff's notice of said sale, which was attached to said sheriff's return, and which was in all respects according to law), to wit:

18 UNITED STATES OF AMERICA, } ss:
State of Kansas, Shawnee County, }

State of Kansas to the sheriff of Shawnee county, Greeting:

Whereas Martha Barnitz, on the 7th day of July, A. D. 1893, recovered a judgment before the district court within and for the county of Shawnee, in the third judicial district of the State of Kansas, against R. Riblet, W. F. Monteith, and H. C. Campbell, in a certain cause then pending in said court, No. 14525, wherein Martha Barnitz was plaintiff and George A. Kirkland, Thomas Cooney, Betsey Cooney, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka, a corporation; The City of Topeka, William Fairchild, A. M. Fuller, E. A. Barber, John L. Beverly, W. F. Monteith, R. Riblet, A. W. Pliley, L. W. Lawrence, H. C. Campbell, and Hurly Baldy were defendants, for the sum of two thousand one hundred and thirteen and $\frac{46}{100}$ dollars debt, and interest thereon from July 7th, 1893, at the rate of 12 per cent. per annum, and also for the sum of forty-eight and $\frac{75}{100}$ dollars, as cost in this behalf expended, with four dollars costs in this and previous order of sale;

And whereas, at the same time, in said court, in said cause, it was further considered, ordered, and adjudged by said court that an order of sale do issue to the sheriff of said county commanding him to cause the lands and tenements in said petition described, to wit, the northeast quarter ($\frac{1}{4}$) of section twelve (12), township ten (10) south, of range twelve (12) east, of the sixth (6th) principal meridian, in the county of Shawnee, in the State of Kansas, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, to be advertised and sold without appraisement in the manner prescribed by law and apply the proceeds arising from such sale, first, the costs and accruing costs of this action; second, the judgment in favor of this plaintiff, with accruing interest thereon, and the surplus, if any, shall be brought into this court for the further order of the court for the equitable distribution by the court:

These are, therefore, to command you to cause the property above described to be advertised and sold according to law, and from the proceeds of such sale pay, first, costs and accruing costs; 2nd, plaintiff's judgment, with accrued interest, and the surplus pay into this court to abide its further order.

You will make due return of this writ before the court aforesaid in sixty days from the date hereof, with your proceedings endorsed thereon.

Witness my hand and the seal of said court, affixed at my office, in the city of Topeka, this 9th day of January, A. D. 1894.

[SEAL.] S. M. GARDENHIRE, *Clerk,*
By A. D. HUBBARD,
Deputy Clerk.

19 [Endorsed:] No. 14525. D. C. S. C. Martha Barnitz *vs.* George A. Kirkland *et al.* Deeded to Martha Barnitz Feb. 27, 1894. Order of sale. Filed January 9th, 1894, returnable sixty days, 189-.

Plaintiff's debt	$2,113 46
—— debt	
Interest from July 7, '93, at 12 per cent	
Cost, circuit court	
Cost, district court	$48 75
Additional cost	4 00
	25 00
	5
Total	82 75

Ferry & Doran, attorney- for plaintiff. Filed Feb'y 16, A. D. 1894. S. M. Gardenhire, clerk.

Received this writ this 9th day of January, A. D. 1894, and according to the command thereof I did, on the 11th day of January, A. D. 1894, proceed to advertise for sale the following real estate, situate in the county of Shawnee and State of Kansas, to wit, the northeast quarter (¼) of section twelve (12), township ten (10) south, of range twelve (12) east, of the 6th principal meridian, in Shawnee county, Kansas; and on the said 11th day of January, A. D. 1894, I caused a notice to be published in the Weekly State Journal, a weekly newspaper printed in said county of Shawnee and has been continuously and uninterruptedly published in said county during the period of fifty-two consecutive weeks prior to the first publication of said notice and of general circulation therein, that I would offer the said premises for sale at the front door of the court-house, in the city of Topeka, Shawnee county, Kansas, on the 12th day of February, A. D. 1894, at 10 o'clock a. m. of said day, and at the time and place stated in said notice I offered the said premises for sale and sold the same to Martha Barnitz for the sum of $2,000.00, -he being the highest and best bidder therefor.

Sheriff's fees, $24.50.

Given under my hand this 12th day of February, A. D. 1894.

D. N. BURDGE,
Sheriff of Shawnee County.

20 And thereafter, to wit, on the said 16th day of February, 1894, the said plaintiff, by her attorneys, duly filed in said court a motion for the confirmation of such sale so made by said sheriff; which motion was in the words and figures following, to wit:

Motion for Confirmation of Sale.

In the District Court of Shawnee County, Kansas.

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, JOHN L. BEVERLY, *et al.*, Defendants. } No. 14525.

Comes now said plaintiff, the purchaser of the real estate involved in the above-entitled action, to wit, the northeast quarter (¼) of section No. twelve (12) township No. ten (10) south, of range No. twelve (12) east, of the sixth (6th) principal meridian, in Shawnee county, Kansas, at a sale made Monday, February 12th, 1893, at ten o'clock a. m. of said day, by the sheriff of said county, and moves the court for the confirmation of said sale of real estate, said sale and proceedings being regular, as the return of the sheriff shows, and no exceptions having been filed thereto and the cost of said action having been paid.

FERRY & DORAN,
Attorneys for Plaintiff.

And afterwards, to wit, on the 20th day of February, 1894, the said defendant, John L. Beverly, duly filed in said court his motion and affidavit in said cause; which motion and affidavit was in the words and figures following, to wit:

In the District Court in and for Shawnee County, Kansas.

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, THOMAS COONEY, BETSY Cooney, H. J. Martin, Sr., Crissie H. Kirk, The American Bank of North Topeka (a Corporation), The City of Topeka, William Fairchild, A. M. Fuller, E. A. Barber, John L. Beverly, W. F. Monteith, R. Riblet, A. W. Pliley, L. W. Lawrence, and Hurly Baldy, Defendants. } No. 14525.

Motion.

And now comes John L. Beverly, one of the above-named defendants, by his attorney, E. A. McMath, and moves the court that upon confirmation of the sale made by the sheriff of Shawnee county on the 12th day of February, 1893, of the mortgaged premises described in the judgment herein, and in case an order is made by this court confirming said sale, then that this court do further order, adjudge, and determine that said real estate so sold is subject to redemption, as provided by chapter 109 of the Laws of 1893, and that said sheriff be ordered and directed to make to the purchaser

at said sale the certificate of sale mentioned and prescribed by said chapter 109.

21 And as grounds for said motion the said John L. Beverly alleges and shows to the court that at the date of the judgment herein and at the date of the sale of said real estate by said sheriff he was and now is the owner of said real estate and the holder of the legal title thereto, and that at the date of said sale he was and still is in actual possession of said real estate by his tenant, and that said lands have never been abandoned, but were and have been since the commencement of this action occupied in good faith.

JOHN L. BEVERLY,
By E. A. McMATH,
His Attorney.

STATE OF KANSAS, }
Shawnee County, } *ss:*

John L. Beverly, being duly sworn, says that he is one of the defendants in the above-entitled action, and that all of the allegations and statements in the foregoing motion contained are true.

JOHN L. BEVERLY.

Sworn to and subscribed before me this 19th day of February, 1894.

[SEAL.] W. F. MONTEITH,
Notary Public.

My commission expires April 27th, 1896.

And afterwards, to wit, on the 26th day of February, A. D. 1894, the said cause duly came on again for hearing before the said court upon the said motion of the plaintiff for a confirmation of the sheriff's sale made as aforesaid and upon the aforesaid motion of the defendant John L. Beverly.

And the said plaintiff thereupon moves the court for an order confirming said sale and directing the sheriff to issue a deed of the premises so sold to the plaintiff as purchaser and for the immediate possession of said premises, and in support of said motion exhibits to the court the sheriff's return upon the order of sale issued as aforesaid out of this court on the 9th day of January, 1894.

And the said defendant, John L. Beverly, thereupon moves the court that, in case an order is made confirming said sale, the said sheriff be directed to execute to said purchaser a certificate of purchase, in accordance with chapter 109 of the Laws of 1893, and providing for the redemption of said property, in pursuance of said law, and further objects to any order being made by this court providing for the immediate execution and delivery of a sheriff's deed to said purchaser or for the immediate possession of said property to be delivered to said purchaser. In support of such motion defendant reads the affidavit and motion of said John L. Beverly, a copy of which is hereinbefore set forth on page —.

No other evidence was offered or given on said hearing by either party.

The court, being fully advised in the premises, held that chapter 109 of the Laws of 1893, relating to the sale and redemption of real estate, is unconstitutional so far as it is intended to apply to mortgages previously executed and delivered, and that the said defendant, John L. Beverly, is not entitled to any right of redemption under said statute, for the reason that the mortgage foreclosed in this action was executed and delivered prior to the enactment of said law, and denies the motion of said defendant, Beverly, that a certificate issue in accordance with said statute; to which ruling of the court said defendant then and there duly excepted.

And the court thereupon ordered that said sale and pro-
22 ceedings be confirmed, and that the sheriff do forthwith execute a deed of said property to said Martha Barnitz, the purchaser at such sale, and that she be let into the immediate possession of said property, and that the said defendants and each of them deliver possession to said purchaser upon the production of such sheriff's deed, and that upon their refusal to deliver possession to said purchaser a writ of assistance therefor issue to the said sheriff, commanding him to put the said purchaser into possession of said property; to which rulings and order of the court and to each and every part thereof the said defendant, John L. Beverly, then and there duly excepted.

And the following journal entry was duly filed and entered in said cause, to wit:

Journal Entry.

Be it remembered that on this 26th day of February, 1894, the Shawnee County district court met pursuant to adjournment, Honorable Z. T. Hazen, judge, present and presiding, at which time the following proceedings were had, to wit:

MARTHA BARNITZ, Plaintiff,
vs.
GEORGE A. KIRKLAND, JOHN L. BEVERLY, *et al.*, Defendants. } No. 14525.

And now, on this 26th day of February, 1894, comes Martha Barnitz, the purchaser at a sale of the real estate involved in the above-entitled action, by Ferry & Doran, her attorneys, and on motion of said purchaser and on showing to the court the return of the sheriff of this county of a sale of real estate made by him on the 12th day of February, 1894, at 10 o'clock a. m. of said day, to said Martha Barnitz upon an order of sale issued in this case, and dated the 9th day of January, 1894, and the court having carefully examined the proceedings of the sheriff in making the said sale, and no exception having been filed thereto, and being satisfied that said sale has been made in all respects in conformity to law and the statutes in such case made and provided—

It is ordered and adjudged by the court that said sale and proceedings be, and the same are hereby, in all respects confirmed, and the clerk of this court is hereby directed to make an entry on the

journal that the court is satisfied with the legality of said sale, and the said sheriff is ordered to execute and deliver to said Martha Barnitz, the purchaser at said sale, a good and sufficient deed for said lands and tenements so sold, to wit, the northeast quarter of section number twelve (12), township number ten (10) south, of range twelve (12) east, of the sixth (6th) principal meridian, in Shawnee county, Kansas.

It is further ordered and adjudged by the court that the said purchaser of said premises at said sale be let into the possession of said premises and every part thereof, and that said defendants and each of them and any person or persons coming into possession under them or either or any of them since the commencement of this action deliver possession to said purchaser on the production of said sheriff's deed, and on their refusal to deliver possession to said purchaser the clerk of this court is authorized and ordered to
23 issue to the sheriff of this county a writ of assistance, commanding him to put said purchaser into possession of the same.

And thereupon the court heard the arguments of counsel and the evidence on the motion of John L. Beverly for the execution by the sheriff of a certificate containing a description of the property and the amount of money paid by the purchaser, together with the amount of costs, and stating that unless redemption is made within eighteen months thereafter according to law that the purchaser or her heirs or assigns shall be entitled to a deed for the same; and the court, being well informed in the premises, overrules said motion and ordered a deed to be executed to the purchaser as aforesaid; to which ruling of the court said defendant, John L. Beverly, excepted and still excepts; and said defendant, Beverly, is allowed sixty days in which to make a case for the supreme court.

(Signed) Z. T. HAZEN, *Judge.*

The foregoing contains all the pleadings, evidence, orders of the court, judgments, and proceedings in said cause upon which the aforesaid order of February 26th, 1894, was made or in anywise material to a review of said order by the supreme court, and the same is hereby presented to the said plaintiff as a true case made for the supreme court in said cause on this 27th day of April, A. D. 1894.

E. A. McMATH,
Att'y for the Defendant, John L. Beverly.

Due and personal service of the foregoing case made is hereby admitted this 27th day of April, A. D. 1894.

FERRY & DORAN,
Attorneys for Martha Barnitz, Plaintiff.

STATE OF KANSAS, } ss :
Shawnee County, }

The above and foregoing case made was duly presented to me for settlement, at the court-house, in the city of Topeka, in said county,

on this 1st day of May, 1894, by E. A. McMath, attorney for the defendant, John L. Beverly; and it appearing to me that said case made was duly served by the attorney for said Beverly upon the plaintiff's attorney in due time as required by law and by the order of this court, and no amendments having been suggested on the part of the plaintiff, and L. S. Ferry, attorney for the plaintiff, being now here present and consenting to the settlement thereof at this time, I do hereby certify that the foregoing case made is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, proceedings, and judgments had in such cause. I do hereby settle, allow, certify, and sign the same as correct and a true case made for the supreme court and do hereby order the clerk of said district court to attest and file the same as provided by law and to thereafter deliver the same, upon demand, to the attorney for the defendant, John L. Beverly, for filing in the supreme court.

Witness my hand, at Topeka, in said county, the 1st day of May, A. D. 1894.

Z. T. HAZEN,
Judge District Court, Shawnee County, Kansas.

Attest:
[SEAL.] S. M. GARDENHIRE, *Clerk.*

Filed May 3rd, 1894.

S. M. GARDENHIRE,
Clerk Dist. Court.

Filed May 3, 1894.

C. J. BROWN,
Clerk Sup. Court.

24 And also on the 3rd day of May, 1894, there was issued from the said supreme court of the State of Kansas a summons in error, which, with the sheriff's return of service thereof, is in words and figures as follows, to wit:

25 STATE OF KANSAS, } ss:
Supreme Court, }

The State of Kansas to the sheriff of Shawnee county, Greeting:

You are hereby commanded to notify Martha Barnitz, defendant in error, that John L. Beverly, plaintiff in error, did, on the 3 day of May, A. D. 1894, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record or case made, the object of which is to obtain a reversal of a certain judgment rendered by the district court sitting within and for the county of Shawnee and State of Kansas, in an action pending before said court wherein the said defendant in error was plaintiff and the said plaintiff in error was one of the defendants.

You will make due return of this summons in error on or before the 14 day of May, A. D. 1894.

Witness my hand and the seal of the supreme court, affixed hereto at my office, in Topeka, this 3 day of May, A. D. 1894.

C. J. BROWN,
Clerk Supreme Court,
[SEAL.] By V. T. GRAVES, *Deputy.*

[Endorsed:] 9770. No. —. Supreme court, State of Kan-
26 sas. John L. Beverly *vs.* Martha Barnitz. Summons in error. Issued May 3, 1894; returnable May 14, 1894. E. A. McMath, attorney for plaintiff in error.

STATE OF KANSAS, } *ss:*
County of Shawnee, }

I received this summons in error on the 3rd day of May, 1894, at — o'clock — m., and served the same on the 3rd day of May, 1894, by delivering a true & certified copy of this summons to L. S. Ferry, of the firm of Ferry & Doran, attorneys for defendant in error in the within-entitled case.

D. N. BURDGE, *Sheriff,*
By T. C. WILKERSON, *Deputy.*

Fees.

Service, ret	1 00
1 mileage	10
1 copy	25
Total	1 35

27 And afterwards, on the 6th day of March, 1895, the same being one of the regular judicial days of the January term, 1895, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, the Honorable Albert H. Horton, chief justice; Honorable W. A. Johnston and Honorable S. H. Allen, associate justices, and C. J. Brown, Esquire, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JOHN L. BEVERLY, Pl'ff in Error, }
vs. } No. 9770.
MARTHA BARNITZ, Def't in Error. }

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Shawnee county; and thereupon, after oral argument by L. S. Ferry for the defendant in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

28 And afterwards, on the 30th day of April, 1895, the same being one of the regular judicial days of the January term, 1895, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present,

the Honorable Albert H. Horton, chief justice; Honorable W. A. Johnston and Honorable S. H. Allen, associate justices, and C. J. Brown, Esquire, clerk of said court—the following proceeding was had and entered of record as follows, to wit:

JOHN L. BEVERLY, Pl'ff in Error,
vs.
MARTHA BARNITZ, Def't in Error. } No. 9770.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

Horton, C. J., delivered the opinion of the court.

Johnston, J., concurring.

Allen, J., dissenting.

29 And also on the 30th day of April, 1895, there was filed in the office of the clerk of said supreme court the syllabus and opinion of the court in said cause, which is in words and figures as follows, to wit:

30 JOHN L. BEVERLY
vs.
MARTHA BARNITZ. } 9770.

Error from Shawnee county. Affirmed.

Syllabus by the Court, Horton, C. J.

The case of Watkins *vs.* Glenn, just decided, followed.

2. Chapter 109, Session Laws of 1893, relating to the sale and redemption of real estate, does not apply to mortgages given prior to the passage of that act.

Johnston, J., concurring.

Allen, J., dissenting.

31 JOHN L. BEVERLY
vs.
MARTHA BARNITZ. } 9770.

Error from Shawnee county. Affirmed.

The opinion of the court was delivered by HORTON, C. J.:

On November 1, 1885, one George A. Kirkland executed and delivered to Martha Barnitz his promissory note for $1,500, and to secure the payment of the note he executed and delivered, at the same time, his mortgage deed upon the following-described real estate, to wit, the northeast quarter of section 12, township 10 south, of range 12, in Shawnee county.

On the same date Kirkland executed and delivered to Martha Barnitz ten interest coupon notes for $60 each, payable at intervals of six months from the date of their execution; which notes were

secured by the same mortgage as the principal note. All of the coupon notes were paid except the one falling due November 1, 1890. The principal note and the last mentioned coupon note not being paid, on January 21, 1893, this action was brought to recover upon the notes and for the foreclosure of the mortgage. Previous to the institution of this act the property was conveyed to various parties and John L. Beverly was the owner of the equity of redemption of the property at the time of the commencement of this action.

The principal note sued upon in this action provides that—

"It is expressly declared and agreed that this note and the coupons hereto attached are made and executed under and are to be construed by the laws of the State of Kansas in every par-
32 ticular." It was stipulated in the mortgage as follows: "But whether the legal holder or holders of this mortgage elect to pay such taxes, assessments, or insurance premiums or not, it is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed and shall be entitled to immediate possession of the premises and the rents, issues, and profits thereof; and the said party of the first part, for said consideration, does hereby expressly waive an appraisement of said real estate."

On July 7, 1893, judgment was rendered in this action for the sum of $2,077.94 and for the foreclosure of the mortgage. Appraisement was waived in the mortgage, and the judgment provided for six months' stay. On January 9, 1894, an order of sale was issued, and on February 12, 1894, the property was sold to Martha Barnitz for $2,000, being less than the mortgage debt or judgment. On February 16, 1894, the order of sale having been duly returned by the sheriff, a motion was filed for the confirmation of the sale, and on February 26, 1894, the sale was confirmed by the court and the sheriff ordered to execute a deed of the premises to the purchaser. At the time of the hearing of the motion for the confirmation of the sale, John L. Beverly appeared and showed to the court that he was the owner of the equity in the premises and in the possession thereof by tenant, and asked the court to order the sheriff to execute to the purchaser a certificate under section 1, chapter 109, Session Laws of 1893. This request was denied. The court ruled that chapter 109 of the Laws of 1893, relating to the sale and redemption of real estate, is unconstitutional, so far as it is intended to apply to mortgages previously executed and delivered, and that the defendant is not entitled to any right of redemption under the statute, for the reason that the mortgage foreclosed in this action was executed and deliv-
33 ered prior to the enactment of said law.

From the order and judgment of the court directing the sheriff to execute a deed to the premises to Martha Barnitz, John L. Beverly appeals to this court. The only question for the court to determine is whether, under the admitted facts, the court below should have ordered the sheriff to execute to the purchaser of the premises a deed or a certificate of purchase.

The judgment will be affirmed under the authority of Watkins

vs. Glenn, just decided. In that case it was ruled that "Any subsequent law of the State which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden by article 1, section 10, of the Constitution of the United States, which ordains that 'no State * * * shall pass any * * * law impairing the obligation of contracts.'

Chapter 109, Session Laws of 1893, concerning the sale and redemption of real estate, has no retroactive operation, and therefore does not apply to mortgage contracts existing at and before its passage. If the legislature intended the act to apply to such contracts it violates article 1, section 10, of the Constitution of the United States."

Judgment affirmed.

Johnston, J., concurring.

Allen, J., dissenting.

34 And afterward, on the 28th day of May, 1895, there was filed in the office of the clerk of said supreme court a motion for a rehearing, which is in words and figures as follows, to wit:

In the Supreme Court of the State of Kansas.

JOHN L. BEVERLY, Plaintiff in Error,
vs.
MARTHA BARNITZ, Defendant in Error. } No. 9770.

Motion for Rehearing.

And now comes the above-named plaintiff in error, by his attorney, and moves this honorable court to grant a rehearing of the decision in this cause.

E. A. McMATH,
Att'y for Plaintiff in Error.

No. 9770. John L. Beverly, pl'ff in error, *vs.* Martha Barnitz, def't in error. Motion for rehearing. E. A. McMath, att'y for pl'ff in error. Filed May 28, 1895. C. J. Brown, clerk supreme court.

35 And afterwards, on the 6th day of September, 1895, the same being one of the regular judicial days of the July term, 1895, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable David Martin, chief justice; Honorable W. A. Johnston and Honorable S. H. Allen, associate justices, and C. J. Brown, Esquire, clerk of said court—the following proceeding was had and entered of record as follows, to wit:

J. L. BEVERLY, Plaintiff in Error,
vs.
MARTHA BARNITZ, Defendant in Error. } No. 9770.

Now comes on to be heard the motion of plaintiff in error for a rehearing of this cause; and thereupon, after oral argument by

Wm. J. Scott for the motion and by L. S. Ferry *contra*, said motion is submitted on brief of counsel for plaintiff in error and taken under advisement by the court.

36 And afterwards, on the 7th day of December, 1895, the same being one of the regular judicial days of the July term, 1895, of the supreme court of the State of Kansas, before the said court, in session at the supreme court room, in the city of Topeka—present, the Honorable David Martin, chief justice, and Honorable W. A. Johnston and Honorable S. H. Allen, associate justices, and C. J. Brown, Esquire, clerk of said court—the following proceeding was had, among others, as follows, to wit:

JOHN L. BEVERLY, Pl'ff in Error,
vs.
MARTHA BARNITZ, Def't in Error. } No. 9770.

Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered and adjudged that the said motion be allowed, that the judgment of affirmance heretofore entered be vacated and set aside, and that the judgment of the court below overruling the motion of plaintiff in error for the issue of a certificate of sale instead of a deed be reversed, and that this cause be remanded with the order that the court below direct the issuance of a certificate of sale, as provided by chapter 109 of the Laws of 1893, and in accordance with the views of this court as expressed in its written opinion filed herein. It is further ordered that the defendant in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

Martin, C. J., delivered the opinion of the court.

Allen, J., concurring.

Johnston, J., dissenting.

37 And also on the 7th day of December, 1895, there was filed in the office of the clerk of said supreme court the syllabus and opinion of the court upon the rehearing of said cause, which are in words and figures as follows, to wit:

38 JOHN L. BEVERLY
vs.
MARTHA BARNITZ. } 9770.

Error from Shawnee county.

Motion for rehearing granted and judgment reversed.

Syllabus by the Court, Martin, C. J.

Chapter 109, Session Laws of 1893, commonly known as the redemption law, whether applied to existing or future contracts, is not in conflict with the provision of the Federal Constitution that "no

State shall * * * pass any * * * law impairing the obligation of contracts."

Allen, J., concurring.

Johnston, J., dissenting.

39 JOHN L. BEVERLY vs. MARTHA BARNITZ. } 9770.

Error from Shawnee county.

Motion for rehearing granted and judgment reversed.

The opinion of the court was delivered by MARTIN, C. J.:

On November 1, 1885, George A. Kirkland executed a negotiable promissory note to Martha Barnitz for $1,500, payable in five years, with interest at 8 per cent. per annum, and after maturity at the rate of 12 per cent. per annum, which note was secured by a mortgage on a quarter section of land in Shawnee county, Kansas, appraisement being waived. The land was afterward sold to John L. Beverly, subject to the mortgage. On January 21, 1893, an action was commenced in the district court of Shawnee county to obtain judgment upon said note and to foreclose said mortgage. On July 7, 1893, a personal judgment was rendered for $2,113.46, bearing interest from that date at the rate of 12 per cent. per annum, and $44.95 costs, and the land was ordered to be sold for the payment of said judgment. On January 9, 1894, an order of sale was issued and the property was sold to Martha Barnitz by the sheriff on February 12, 1894, for $2,000. On February 19, 1894, John L. Beverly filed a motion asking that upon confirmation of the sale the court order, adjudge, and determine that said real estate is subject to redemption, as provided by chapter 109 of the Laws of 1893 (which took effect March 17, 1893), and that the
40 sheriff be ordered and directed to make to the purchaser the certificate of sale mentioned in said chapter, he being in actual possession of said real estate by his tenant, the same never having been abandoned, but being occupied in good faith. This relief was refused by the court, and it was ordered that the sale be confirmed and a deed executed by the sheriff to the purchaser for said premises, holding that said chapter 109 is unconstitutional so far as intended to apply to mortgages previously executed and delivered. On a proceeding in error in this court said judgment was affirmed. The companion case of Watkins *vs.* Glenn was decided at the same time, and the opinions appear in 55 Kan., 40 Pac. Rep., 316–326. The plaintiff in error asks a rehearing.

Does this statute impair the obligation of this prior contract? If it does so in the slightest degree, it must be held unconstitutional as to such contract. If, on the other hand, the act affects only the remedy or some provision of the contract which is inoperative and void under the laws of Kansas, where the contract was made, then it must be held valid; and all legal presumptions, so far as this

court is concerned, favor the validity of the act. (Cooley's Const. Lim., 216, 217.)

When Chief Justice Marshall delivered the opinion of the Supreme Court of the United States in Sturges *vs.* Crowninshield, 4 Wheat., 122, the learning upon the inhibition "no State shall * * * pass any * * * law impairing the obligation of contracts" was well nigh exhausted; little was left for other or subsequent judges of that tribunal but to apply the law as there clearly laid down. The legislature of New York had in 1811 enacted an insolvent law
41 which not only purported to liberate the person of the debtor, but to discharge him from all liability for any debt contracted previous to his discharge on surrendering his property in the manner prescribed by the act, and it was held that in so far as it purported to discharge a debtor from his obligation without performance it was invalid, but not so as to releasing the debtor from imprisonment, then a common and very persuasive remedy. The court says (p. 197):

"A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it."

And again (pp. 200, 201):

"The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract or may be allowed as a means of inducing him to perform it; but the State may refuse to inflict this punishment or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

See also Mason *vs.* Haile, 12 Wheat., 370; Beers *vs.* Haughton, 9 Pet., 329, 359; Penniman's case, 103 U. S., 714, 717.

In Bronson *vs.* Kinzie, 1 How., 311, 315, 316, the court, speaking through Chief Justice Taney in respect to an Illinois mortgage, said:

"If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description they would be liable to no constitutional objection, for, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitation. It may, if it thinks proper,

direct that the necessary implements of agriculture or the
42 tools of the mechanic or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary to the existence and well-being of every community, and, although a new remedy may be deemed less convenient than the old one and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

In Terry *vs.* Anderson, 95 U. S., 628, it was held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar takes effect. The court says (p. 633): "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue."

In Antoni *vs.* Greenhow, 107 U. S., 769, 774, 775, although the Virginia funding act of 1871 required the State to receive certain coupons for all taxes and demands due her and authorized the writ of mandamus to compel the proper tax-collector to receive the same, yet the act of 1882, which required the coupon-holder to first pay his taxes in cash and file his coupons in the court of appeals and after a circuitous proceeding receive back his cash in lieu of the coupons, was held to affect only the remedy and not to constitute an impairment of the contract.

In Life Insurance Co. *vs.* Cushman, 108 U. S., 51, it was decided that the Illinois statute of 1879 entitling the purchaser in
43 case of redemption to receive interest upon his bid at the rate of 8 per cent. per annum (the previous law prescribing 10 per cent.) was applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute; that such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay or shorten the period of payment or affect any remedy which the mortgagee had by existing law for the enforcement of his contract, and that existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted are only those which in their direct or necessary legal operation controlled or affected the

obligations of their contract; and in the opinion the court says (p. 64, 65):

"The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or, at least, when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee; and to require it as purchaser to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase does not in any legal sense impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject, necessarily, to the law then in force defining the rights of purchasers."

And again the court says (p. 66):

"That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

44 In Morley *vs.* Lake Shore R'l'y Co., 146 U. S., 162, it was held that a State was not forbidden by the clause of the Federal Constitution under consideration from legislating within its discretion to reduce the rate of interest upon judgments previously obtained in its courts, the judgment creditor having no contract whatever in that respect with the judgment debtor. The court held that the State law regulating the rate of interest on judgments formed no part of the contract, and quoted approvingly (p. 171) from the opinion of Chief Justice Marshall in Ogden *vs.* Saunders, 12 Wheat., 213, 343, as follows:

"If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other State as in New York, and would still retain the stipulation originally introduced into it."

In Curtis *vs.* Whitney, 13 Wallace, 68, the court held that a statute which requires the holder of a tax-sale certificate made before its passage to give three months' notice, with a copy of the certificate, the name of the holder, and the time the deed will be applied for, to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate, and accordingly a tax deed was adjudged void for want of the notice.

Justice Miller, in delivering the unanimous opinion of the court, said (pp. 70, 71):

"That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States, nor does every statute which affects the value of a contract impair

its obligation. It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by State and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made and enhance the cost and difficulty of performance or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in full force."

In each of the foregoing cases, except that cited from 1 How., the Supreme Court of the United States held that the State statute enacted subsequent to the making of the contract affected the remedy only and not the obligation of the promissor to perform his contract, and other cases of like character might be cited. In some cases expressions have been used in the opinions of the judges which, if taken alone, would obliterate the line of demarkation between the obligation of the contract and the remedy for its enforcement, but, as was well said by Chief Justice Marshall in Ogden *vs.* Saunders (12 Wheat., p. 333), "The positive authority of a decision is coextensive only with the facts on which it is made," and opinions of judges are to be understood in the light of the issues to be decided and as limited by them. Thus in Louisiana *vs.* New Orleans, 102 U. S., 203, Justice Field, in delivering the unanimous opinion of the court, said (p. 206, 207):

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

But it was therein held that a State law requiring the registry in the office of the controller of judgments rendered against the city of New Orleans on former contracts before any proceeding could be had for their enforcement was a reasonable regulation and constitutional. The bonds in judgment were issued in 1854, and prior to the act of 1870 the judgment creditor was entitled to the writ of mandamus to enforce collection. That act, however, purported to divest the courts of the State of authority to allow any summary process or mandamus against said city to compel payment, and required that judgment creditors file transcripts of their judgments in the office of the controller, after which the judgments should be paid in the order of their registration. The supreme court of Louisiana held that this act was valid and the plaintiff's case was dismissed and all relief denied, and this decree was affirmed by the Supreme Court of the United States. This decision is in line with Curtis *vs.* Whitney, *supra*, where the holder of the tax deed was defeated because he did not comply with the subsequent State law requiring him to give to the occupant notice of the time when he would apply for a deed, together with a copy of the tax-sale certificate. The cases are in entire harmony, and yet it seems impossible to reconcile the propositions of the two great

cotemporary jurists who wrote the respective opinions, each concurring, however, in the opinion of the other. It is too much to expect perfect accuracy and clearness of doctrinal statement at all times, even from great judges.

Edwards *vs.* Kearzey, 96 U. S., 595, involved the validity of the exemption clause in the North Carolina constitution of 1868. Under the prior statutes the exemptions to debtors in that State were quite limited, the provision of the new constitution being much more liberal, and it was held that this was unconstitutional as applied to prior contracts. Some expressions in the opinion of the court delivered by Justice Swayne might lead to the conclusion that no other or further exemptions were permissible than those existing at the date of the contract, but this would be a
47 contradiction of the doctrines announced by the Supreme Court in prior and subsequent cases, and the concurring opinions of Justices Clifford and Hunt plainly show that the decision was placed upon the ground that the extension of the exemption was so large as to seriously impair the creditor's remedy for collection of his debt, Justice Clifford saying, "Beyond all doubt a State legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract." In the opinion delivered by Justice Swayne, he says: "The remedy subsisting in a State when and where a contract is made and is to be performed is part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution of the United States, and therefore void." And this clause of the opinion is made the syllabus in the report of the case. It would be difficult to justify the first clause of this sentence by any decision of the Supreme Court or upon any principle of general jurisprudence. We know that the general remedies provided by our State laws do not form part of a contract, for if so they would necessarily be effective in any State or country where suit was brought to enforce the contract. It is a fundamental principle, not requiring in its support the citation of authorities, that the remedy is governed by the *lex fori* and not by the *lex loci contractus*. A lawyer suing in the courts of this State upon a contract made in
48 Louisiana, New York, or Illinois would be thought reckless, indeed, if he should presume to ask remedies allowable under the laws of those States respectively, but not recognized here. The most that can be truthfully said is that each civilized State is under a moral obligation to afford to foreign or domestic creditors adequate remedies for the enforcement of their rights, but these are subject to changes at any time, whether as to existing or future contracts. If by the last clause of the proposition it is meant that any substantial impairment of the contract is forbidden, certainly there can be no objection to it, but the value of a contract may be incidentally lessened by State legislation without impairing its obligation at all, as decided in many cases by the supreme Federal tribunal.

In Seibert *vs.* Lewis, 122 U. S., 284, the syllabus in Edwards *vs.* Kearzey, *supra*, is quoted approvingly, but its principle was in no-wise necessary to a decision of the case. By the act of March 23, 1868, the legislature of Missouri authorized the issue of bonds in payment of subscriptions to the stock of railroad companies, and therein stipulated that the county court should from time to time levy and cause to be collected in the same manner as county taxes a special tax in order to pay the interest and principal of any such bond, and it was held by the supreme court that it was a material part of this statutory contract that such creditor should always have the right to a special tax to be levied and collected in the same manner as county taxes, and that a subsequent act of the legislature which took away this right and gave in return no equivalent means of payment was an impairment of the contract. There are other cases of like character, and certainly a creditor who
49 takes the bond of a municipality upon the assurance of a statute which authorizes its issue and provides the means for its payment has a right to rely upon such statute as implicitly as upon the stipulation of the terms of payment in a private contract, but a bondholder would have no just cause to complain if the number of the terms of court should be reduced or the obtaining of an order of attachment rendered more difficult or the law as to the appointment of receivers modified. Such matters do not enter into the contemplation of the parties in making a contract so as to forbid a legislative change nor follow the contract into other jurisdictions. The correct doctrine is concisely stated in 3 Am. & Eng. Enc. of Law, 753, as follows:

"The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or arrogated by the legislature in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts. But if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is as to them inoperative."

This brings us to a consideration of the change of our law as to the redemption of real estate. Prior to 1893 lands could not be sold for less than two-thirds of their appraised value, unless appraisement was waived in the mortgage or the bond or promissory note which it was given to secure; but in case of such waiver the order could not issue for the sale of the lands until six months after the rendition of the judgment. Of course, the mortgagor might redeem at any time before actual sale by paying his debt, interest, and costs. By the act of 1893 the statutes requiring appraisement were repealed so that an order of sale may be issued at any time after the entry of judgment and the land,
50 after due notice, sold for whatever price it will bring. Upon confirmation, which may be had at any time after the sale when the district court is in session in the county, the creditor is en-

titled to the proceeds of the sale up to the amount of his judgment, interest, and costs. Under our practice a personal judgment is rendered in the first instance for the full amount due, and if the proceeds of the sale are insufficient to pay the whole judgment debt, interest, and costs they are simply credited thereon, so that it is unnecessary to obtain a judgment over as in *in* the Federal courts of equity, and a general execution may issue for the balance due. The act of 1893 does not operate upon the rights of the mortgagee until his claim as such has been extinguished, either wholly or to the full extent of the proceeds of the sale of the mortgaged property. The mortgagor, it is true, may redeem the land within a certain time by payment of the sale price and interest thereon, but this is a matter wholly between him and the purchaser. If the mortgagee or judgment creditor has deemed it best to become the purchaser, and thus voluntarily change his relation, it is difficult to see how he has any just cause of complaint. By the mortgage contract the real estate was pledged for the payment of the debt, subject to the equity of redemption. The State, by its proper officer, has, at his instance, sold the property for its payment, and after he gets the proceeds of the sale he has no further claim upon that property, although he may proceed by general execution to obtain any balance due by seizure and sale of other property. "In this State the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories demolished. The
51 mortgagee has a mere security, creating a lien upon the property, but vesting no title and giving no right of possession whatever, either before or after breach. The statute confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises" (Waterson *vs.* Devoe, 18 Kan., 223, 232, 233). "A real-estate mortgage conveys no estate or title in whatever form the mortgage may be drawn. It creates only a lien upon the mortgaged property, and such lien can be enforced only by a judgment or order of the district court. A holder of a real-estate mortgage cannot, even after condition broken, take possession of the mortgaged property or of the rents or profits thereof, except by consent of all the parties or by an action in the district court, and he cannot realize upon his mortgage except by judgment of such court, and this is true whatever the form of the mortgage may be. * * * Where the mortgaged property is not a sufficient security for the mortgage debt the district court may in some cases appoint a receiver to take charge of the mortgaged property and to receive the rents and profits thereof; but in no case can the holder of the mortgage, without suit and without the consent of the mortgagor or his assignee, take possession of either the real estate mortgaged or the rents or profits thereof." (Seckler *vs.* Delfs, 25 Kan., 159, 165.)

The act of 1893 does not purport to repeal or modify section 254 of the Code of Civil Procedure (par. 4349, Gen. Stat. 1889), which authorizes the appointment of a receiver in a foreclosure case "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured," or when "the condition of

the mortgage has not been performed" and "the property
52 is probably insufficient to discharge the mortgage debt." In such case a receiver may be appointed at any time after the action is commenced, and the receivership may continue until the sale of the land by the sheriff when the mortgagee's claim upon it is satisfied and extinguished, and as a creditor he has no further concern with it. The act of 1893 does not become operative until after the sale, and it matters not to the former creditor how the land is occupied during the period of redemption. Where appraisement is waived, as in this case, the mortgage creditor may now have a sale on request six months sooner than formerly. In certain contingencies the purchaser may obtain a deed as soon after judgment as under the old law; in others he may be compelled to wait at most a year longer, but the redemptioner must pay interest in the meantime, which is generally accounted an equivalent for use and occupation.

It may be said, however, that the creditor is prejudicially affected by this change of the law, because purchasers may be unwilling to pay as high a price as before; but in this country land is not esteemed as in the old world. Here it is largely a subject of investment and speculation, and in many cases the purchaser would prefer a return of his money, with interest, to a deed for the land. A court could hardly say judicially that land would sell for less by reason of this change of the redemption law. Such considerations, like the lowering of the rate of interest to be paid by the redemptioner, are "too remote," as held in Life Ins. Co. *vs.* Cushman, *supra*, "to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

53 A real-estate mortgage is not what it purports to be on its face anywhere. In Kansas it has been shorn of all its common-law incidents as we have seen, and this is true in most of the other States. It may be stipulated in the mortgage that upon default of payment of principal or interest the mortgagee shall be entitled to possession of the mortgaged premises. It is vain. It may be solemnly agreed that in such case the rents and profits shall be applied toward the satisfaction of the debt and interest. It is as nothing. It may be provided that for any particular delinquency a receiver may be appointed. It is a waste of words. The mortgagor may even be driven by his necessities to bargain away in the mortgage his equity of redemption. Equity will treat it as void. For any such purpose the Kansas short form of mortgage authorized by statute (par. 3886, Gen. Stat. 1889), which contains not a word upon any of these subjects, is no less potent than the most tedious iron-clad instrument ever devised by the writ, the cunning, and the avarice of man. All such clauses are treated by the courts as if they were not.

In Clark *vs.* Reyburn, 8 Wall., 318, a decree of strict foreclosure was entered on a Kansas mortgage in the United States circuit court. There was no act of Congress, nor State statute, nor rule of court forbidding this practice nor purporting to give any time to redeem after foreclosure, yet the supreme court reversed the decree, holding

that as the 90th equity rule directs that the practice of the circuit courts shall be regulated where no rule is applicable by that of the high court of chancery in England, so far as it can be applied consistently with the local circumstances and conveniences of the
54 district where the court is held, and as by the English practice a period of at least six months was allowed for redemption, the decree cutting off the mortgagor without time to redeem was erroneous. Justice Swayne, delivering the opinion of the court, said (pp. 321, 322):

"The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim 'once a mortgage always a mortgage,' but any limitation of the right to redeem as to time or persons by a stipulation entered into when the mortgage is executed or afterwards is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specific time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener at the discretion of the chancellor according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute."

And again he said (pp. 323, 324):

"The settled English practice is for the decree to order the amount due to be ascertained and the costs to be taxed, and that upon the payment of both within six months the plaintiff shall reconvey to the defendant; but in default of payment within the time limited 'that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises.' We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the chancellor and to be regulated by the circumstances of the particular case, but he nowhere intimates that such an allowance could be entirely withheld."

The equity of redemption being a creature of the courts of chancery and impliedly reserved by the mortgagor notwithstanding any language incorporated into the mortgage, it results that the
55 State legislatures may deal with and regulate it upon equitable

principles and may abate the rigors of the common-law foreclosure in any reasonable way, having due regard to the obligations of the mortgage contract as interpreted by courts of equity. The Federal courts of equity first allow six months from the decree of foreclosure in which to redeem as an incident of the remedy, and this may be extended once or oftener "at the discretion of the chancellor, according to the circumstances of the case." In some cases, notably in foreclosures upon railways and other extensive properties, the time is extended for years, the subject-matter of the litigation being held in the meantime by receivers appointed upon the same equitable principles as prescribed by our statutes hereinbefore cited. Again, such courts refuse to confirm masters' sales where the purchase price is grossly inadequate, and in cases of peculiar hardship they deny judgment over, according to the 92nd equity rule, for any balance due after the application of the proceeds of the mortgaged property in satisfaction of the debt. It is one of the advantages of courts of equity that their remedies are more flexible than those afforded by the common law. In this State, however, the district courts have full equity powers, and yet foreclosures are governed by rules almost inflexible. Personal judgments are rendered for the full amount due, and the proceeds of the mortgaged property are applied only as a credit thereon so that execution may issue at once for any balance remaining, and, so far as the reports of this court show, no sheriff's sale has ever been set aside on account of inadequacy of price alone, if, indeed, such a thing can be done. (Capital Bank *vs.* Huntoon, 35 Kas., 578, 591, and cases cited.)

56 In the case cited above from 8 Wall. we have seen that the equity of redemption is regarded by the Supreme Court of the Union as an estate distinct from the right vested in the mortgagee, and this estate is indefinite in its duration. In accordance with the English rule, the time given in the first instance is at least six months, and then it may be extended "once or oftener, at the discretion of the chancellor;" and in granting these extensions according to the circumstances of each case the Federal courts of equity have not the remotest idea of "impairing the obligation of contracts." They are endeavoring only to enforce them in a manner dictated by an enlightened system of jurisprudence that seeks not the financial ruin of the mortgagor in the application of his property to the satisfaction of his debt. From causes upon which all do not agree and that we need not discuss, the burden of a private debt has been enormously increased of late years. Farms valued five years ago both by borrower and lender at $3,000 or $4,000 and mortgaged for $1,000 are now knocked down under the sheriff's hammer for less than the mortgage debt, the accumulations of a lifetime being often swept away by the shrinkage, and this through no fault of the mortgagor. Now, may not a State legislature take cognizance of such a condition of affairs and prescribe a rule for application in its courts regulating the equity of redemption and even extending it beyond the time formerly allowed? In other words, why may it not, in a time of general depression, reasonably extend the indefinite

estate impliedly reserved by the mortgagor, as the Federal courts of equity do in particular cases, beyond the six months allowed by the general practice? This reserved estate belongs to the
57 mortgagor, and because of its indefinite duration the legislature ought to have power to regulate it, within reasonable bounds, so as to protect the interests and equities of both debtor and creditor.

Great reliance has been placed by counsel for defendant in error upon the authority of Bronson *vs.* Kinzie, *supra*, and it would be conclusive against our position if a Kansas mortgage of 1885 is to be governed by the rules applicable to the Illinois instrument of date July 13, 1838, which was enforced in that case. There, in order to secure the payment of a certain bond of $4,000, Kinzie conveyed to Bronson "in fee-simple, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that, if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser, and out of the moneys arising from such sale to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie." In the opinion the court says (p. 315): "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois at the time the mortgage deed was executed," * * * and (p. 318) "according to the long-settled rules of law and equity in all of the States whose jurisprudence has been modeled
58 upon the principles of the common law, the legal title to the premises in question vested in the complainant upon the failure of the mortgagor to comply with the conditions contained in the proviso, and at law he had a right to sue for and recover the land," * * * and (p. 319) "when this contract was made no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must therefore be governed and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois at the time, and therefore entered into the contract and formed a part of it without any express stipulation to that effect in the deed."

Thus it appears that under the laws of Illinois then existing the mortgage contract was in law what it purported to be on its face. It gave the legal title and the right of possession to the mortgagee on default of payment, and this no Kansas mortgage ever has done, whatever may have been its stipulations. It therefore could not be otherwise than that the laws of Illinois formed part of the very obligation of the contract, and the rights vested by its terms with the sanction of the laws of Illinois could not be divested by any subsequent law of that State. Where a remedy is agreed upon in

the contract itself with the sanction of the State law the obligation and the remedy are indistinguishable, and in such case it is entirely proper to say that the subsisting remedy is a part of the obligation of the contract. On the other hand, it is safe to say that the general remedies afforded by the State jurisprudence and practice entirely aside from anything contained in the contract never
59 constitute any part of its obligation and may be changed from time to time, and this is the doctrine of Bronson *vs.* Kinzie as quoted in the first reference to the case in this opinion.

The case of Howard *vs.* Bugbee, 24 How., 461, although from Alabama, is in no way distinguishable from Bronson *vs.* Kinzie, as will appear from the briefs and the opinion, and the authority of the earlier case was of course followed. In Alabama as well as in Illinois the real-estate mortgage was clothed with its common-law attributes. (Paulling *vs.* Barron *et al.*, 32 Ala., 9, 11; 1 Jones on Mortgages, sec. 18.)

Bronson *vs.* Kinzie was also decided in part upon a subsequent law requiring an appraisement and prohibiting a sale for less than two-thirds of the appraised value, and there are other cases of like nature; but as appraisement laws and those regulating the equity of redemption depend upon different principles, it is unnecessary to occupy time now with their consideration.

It can be no objection to the statute under review that redemption comes after and not before the sale, for this is a feature favorable to the creditor. He may now have the sale advertised as soon as his decree of foreclosure is entered, and he is entitled to the proceeds whenever the sale is confirmed, and this may be at any time afterward that the district court is in session. The new law speeds the sale, which is unfettered by any stay or appraisement law. Neither can it be a valid objection that the mortgagor or his assignee may redeem the property by paying its sale price, with interest thereon, for the utmost relief that the courts can afford the creditor as to the mortgaged property is to sell it and apply the proceeds to the
60 payment of the debt. If any balance remains the creditor must always look to other property, and our State laws are as favorable to the creditor in this respect as those of any other State in the Union, and, as we have seen, more favorable than the remedies administered by the Federal courts under their practice.

Section 24 of the redemption act in question has been the subject of much criticism. It relates to the appointment of a receiver under certain circumstances after the sale and the application of the income up to the execution of the sheriff's deed; but no question arises under that section in this case, for the record does not show that any receiver was ever appointed or applied for under that section nor under paragraph 4349, Gen. Stat. 1889. It would seem that even if said section should be held invalid the other sections might yet stand firm.

There is a broad line between this case and Greenwood *vs.* Butler, 52 Kan., 424, where the decree of foreclosure had been entered and the rights of the parties fixed thereby prior to the passage of said chapter 109, Acts of 1893.

If a State legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statutes of limitation; if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first instance in cash, to be afterward refunded and the coupons taken up; if it may reduce the rate of interest on redemption from decretal sales; if it may
61 lessen the interest on former judgments; if it may require the holder of a tax-sale certificate to give three months' notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office as a prerequisite to payment and divest the courts of the power to grant remedies in force when the judgments were rendered; if it may reduce the terms of court in number and duration; if it may amend the laws as to attachments, garnishments, and receivers, so as to take away causes therefor which were before sufficient; if, in short, "it may regulate at pleasure the modes of proceeding" in the courts, and all this as to existing obligations, it is difficult to frame a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages as to define and make more certain the indefinite estate impliedly reserved by every mortgagor of real property and called into active existence only by the foreclosure, and which indefinite estate is extended by the Federal courts of equity for six months in the first instance and afterward "once or oftener" in the discretion of the chancellor, according to the circumstances of the case. Even if the statute in question should impair the remedy formerly grantable upon a foreclosure, yet it should not for this reason be held invalid, for there is no constitutional inhibition against an impairment of the general remedies for the enforcement of broken contracts, and each and every of the special examples just cited is an instance of the impairment or abolition of a remedy allowable and in force when the obligation was incurred.

Upon the whole, it does not appear that any judgment or
62 decision of the Supreme Court of the United States requires this court to hold said chapter 109 unconstitutional, whatever may have been remarked by judges in delivering their opinions, for it is quite impossible to harmonize all that they have said, although the judgments or decisions may not be in conflict. Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the final arbiter, the Supreme Court of the Union.

This opinion is of unusual, perhaps unwarrantable, length; but the question involved is so important and the respect of the writer for the deliberate judgment of his predecessor and the associate justice who concurred with him so profound that it has been deemed best to state fully the reasons which lead to a different conclusion from that reached by the former majority of the court.

The motion for a rehearing will be granted, the judgment of the district court overruling the motion of plaintiff in error for the issue of a certificate of sale instead of a deed will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Allen, J., concurring.

JOHNSTON, *J.*:

This case, together with Watkins *v.* Glenn, 40 Pac. Rep., 316; 55 Kas., —, was submitted upon ample briefs and oral argument at the March, 1895, session, and after a full consideration a decision
63 was reached in April following, when it was determined by a majority of the court that the redemption law has no retroactive operation, and therefore does not apply to mortgage contracts existing at and before its passage, and that if the legislature intended the act to apply to such contracts it would violate section 10 of article 1 of the Federal Constitution. The judgment of the court was pronounced by Chief Justice Horton, and I am still satisfied with the views then expressed. The opinion delivered by Chief Justice Horton embodies a careful review of the authorities and such a clear and forcible exposition of the law that I am satisfied no additional force could be added by any further comments that I might make. I refer to that opinion for the grounds of my dissent to the allowance of a rehearing and to the judgment of reversal.

64 And afterwards, on the 6th day of January, 1896, there was filed in the office of the clerk of said supreme court a petition for a writ of error; which, with all endorsements thereon, *are* in words and figures as follows, to wit:

65 In the Supreme Court of the State of Kansas.

JOHN L. BEVERLY, Plaintiff in Error,
v.
MARTHA BARNITZ, Defendant in Error. } No. 9770.

Petition for Writ of Error.

And now comes Martha Barnitz, defendant in error in the above-entitled cause, and says that heretofore and on the 7th day of December, A. D. 1895, this court entered judgment herein in favor of the plaintiff in error and against this defendant in error, in which judgment and the proceedings had prior thereunto certain errors were committed, to the prejudice of this defendant in error, all of which appear more in detail from the assignment of errors filed with this petition.

Wherefore this defendant in error prays that a writ of error may issue to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record,

proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

FERRY AND DORAN AND
VALENTINE, GODARD & VALENTINE,
Attorneys for Defendant in Error.

66 [Endorsed:] In supreme court, State of Kansas. No. 9770. John L. Beverly, pl'ff in error, *vs.* Martha Barnitz, def't in error. Petition for writ of error. Filed Jan. 6, 1896. C. J. Brown, clerk sup. court. Ferry & Doran and Valentine, Godard & Valentine, Real Estate building, Topeka, Kas., attorneys for defendant in error.

67 And also on the 6th day of January, 1896, there was filed in the office of the clerk of said supreme court a writ of error to the Supreme Court of the United States, which is in words and figures as follows, to wit:

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John L. Beverly, plaintiff in error, and Martha Barnitz, defendant in error, wherein was drawn in question the validity of a statute of said State, to wit, chapter 109 of the Laws of the State of Kansas of 1893, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, and wherein was drawn in question the con-
69 struction of a clause of the Constitution of the United States, to wit, article I, sec. 10, and the decision was against the title, right, privilege, or exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said Martha Barnitz, defendant in error, in said court, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—
DAVID MARTIN,
Chief Justice of Supreme Court of the State of Kansas.

70 [Endorsed:] 9770. J. L. Beverly *vs.* Martha Barnitz. Writ of error. Filed Jan. 6, 1896. C. J. Brown, clerk sup. court.

71 And also on the 6th day of January, 1896, there was filed in the office of the clerk of said Supreme Court a citation, which, with proof of service thereof endorsed thereon, is in words and figures as follows, to wit:

72 UNITED STATES OF AMERICA, *ss:*

To John L. Beverly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you, the said John L. Beverly, were plaintiff in error, and Martha Barnitz was defendant in error, and in which proceedings in error the said Martha Barnitz is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David Martin, chief justice of the supreme court of the State of Kansas, this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

DAVID MARTIN,
Chief Justice of the Supreme Court of the State of Kansas.

73 [Endorsed:] 9770. J. L. Beverly *vs.* Martha Barnitz. Citation. Filed Jan. 6, 1896. C. J. Brown, clerk sup. court.

On this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared C. A. Magaw before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John L. Beverly personally at No. 1003 North Jackson street, Topeka, Kansas, on the 6th day of January, 1896.

C. A. MAGAW.

Sworn to and subscribed the 6th day of January, A. D. 1896.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

74 And also on the 6th day of January, 1896, there was filed in the office of the clerk of said supreme court an appeal bond, which, with the approval thereof endorsed thereon, is in words and figures as follows, to wit:

75 Know all men by these presents that we, Martha Barnitz, by Ferry and Doran, her attorneys, as principal, and John R. Mulvane and Frank S. Thomas, as sureties, are held and firmly bound unto John L. Beverly in the full and just sum of five hundred dollars ($500.00), to be paid to the said John L. Beverly, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a regular sitting of the supreme court of the State of Kansas in a suit depending in said court between John L. Beverly, plaintiff in error therein, and Martha Barnitz, defendant in error therein, a judgment was rendered against the said Martha Barnitz, and the said Martha Barnitz having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John L. Beverly, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Martha Barnitz shall prosecute her writ of error to effect and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARTHA BARNITZ, [SEAL.]
By FERRY & DORAN,
Her Attorneys.
JOHN R. MULVANE. [SEAL.]
FRANK S. THOMAS. [SEAL.]

Sealed and delivered in the presence of—

—— ——.

Approved by—

DAVID MARTIN,
Chief Justice of the Supreme Court of the State of Kansas.

76 [Endorsed:] 9770. J. L. Beverly *vs.* Martha Barnitz. Appeal bond. Filed Jan. 6, 1896. C. J. Brown, clerk sup. court.

77 And also on the 6th day of January, 1896, there was filed in the office of the clerk of said supreme court an assignment of errors, which is in words and figures as follows, to wit:

78 In the Supreme Court of the State of Kansas.

JOHN L. BEVERLY, Plaintiff in Error,
vs.
MARTHA BARNITZ, Defendant in Error. } No. 9770.

Assignment of Errors.

Comes now the said defendant in error, Martha Barnitz, and for her assignment of errors in the above-entitled cause to be filed with her petition for a writ of error to the Supreme Court of the United States says that this court committed error in its final decision, determination, and judgment made and rendered in this cause on the 7th day of December, A. D. 1895, in the following particulars, to wit:

1st. The court erred in holding that chapter 109 of the Laws of the State of Kansas of 1893 relating to the sale and redemption of real estate, which took effect March 17th, 1893, determined the form of judgment and the remedy to which this defendant in error was entitled in the foreclosure of a mortgage executed November 1st, 1885.

2nd. The court erred in holding that said chapter 109 of the Laws of the State of Kansas of 1893 is not in violation of that portion of section ten, article one, of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts," as applied to mortgages executed prior to the passage of said chapter 109.

3rd. The court erred in holding that said chapter 109 of the Laws of the State of Kansas of 1893 applies to mortgage contracts
79 executed before the passage of said chapter 109 and in depriving the defendant in error, Martha Barnitz, of the benefit of that portion of section ten, article one, of the Constitution of the United States which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts."

4th. The court erred in rendering judgment against said defendant in error reversing the decision of the district court of Shawnee county, Kansas, and commanding that court to direct the issue to the purchaser of the real estate involved of a certificate of purchase entitling the plaintiff in error herein to redeem from such sale, in accordance with the provisions of said chapter 109, when it should have rendered a judgment affirming the judgment of said district court.

FERRY AND DORAN AND
VALENTINE, GODARD AND VALENTINE,
Attorneys for Defendant in Error.

Endorsed: In supreme court, State of Kansas. No. 9770. John L. Beverly, pl'ff in error, *vs.* Martha Barnitz, def't in error. Assignment of errors. Filed Jan. 6, 1896. C. J. Brown, clerk sup. court. Ferry and Doran and Valentine, Godard and Valentine, attorneys for defendant in error.

80 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled case as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, affixed hereto at my office, in Topeka, this 11th day of January, 1896.

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Case No. 16,153. Kansas supreme court. Term No., 863. Martha Barnitz, plaintiff in error, *vs.* John L. Beverly. Filed January 20, 1896.

863

FILED.
JAN 20 1896
JAMES H. McKENNEY,
CLERK

Granted

In the Supreme Court

of the

United States of America.

MARTHA BARNITZ,
Plaintiff in Error,

vs.

JOHN L. BEVERLY,
Defendant in Error.

Motion to Advance.

LEONARD S. FERRY,
THOMAS F. DORAN,
Attorneys for Plaintiff in Error.

D. M. VALENTINE,
A. A. GODARD,
Of Counsel.

CRANE & CO., TOPEKA.

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

MOTION TO ADVANCE.

COMES now the said Martha Barnitz, plaintiff in error, and respectfully moves this court to advance the above-entitled cause to a speedy hearing and determination, for the reasons and on account of the several matters and things hereinafter set forth.

THE MATTER INVOLVED.

Martha Barnitz, plaintiff in error, commenced this action in the District Court of Shawnee county, Kansas, January 21st, 1893, to recover judgment upon a promissory note, and for the foreclosure of a mortgage given to secure the same, covering certain real estate in said county

owned by the defendant in error, John L. Beverly. The mortgage and note were given and dated November 1st, 1885. July 7th, 1893, she recovered judgment for $2,113.46, and $44.95 costs, and for the foreclosure of her mortgage, the decree providing that the order of sale should not issue for six months. February 12, 1894, the property was sold by the sheriff, in pursuance of an order of sale issued under the foreclosure decree, and was purchased by Martha Barnitz for $2,000. February 26, 1894, the sale was confirmed and the sheriff ordered to execute a deed to the purchaser. At the time of the confirmation, defendant in error, Beverly, appeared and showed to the court that he was in possession of the premises, and asked that the sheriff execute to the purchaser a certificate under the provisions of chapter 109 of the Laws of Kansas of 1893. This request was denied, and the sheriff was ordered to execute a deed. Beverly took an appeal to the Supreme Court of the State of Kansas.

Said chapter 109 took effect March 17th, 1893. Sections one, two, and twenty-five of the act provide as follows:

"SECTION 1. After sale by the sheriff of any

real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date, stating that unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: *Provided*, That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"SEC. 2. The defendant owner may redeem any real property sold under execution, special execu-

"SEC. 25. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanic's lien, or other lien, whether special or general, and the terms of redemption shall be the same."

[illegible] law, and a purchaser of real estate at sheriff's sale was entitled to a deed as soon as the sale was confirmed.

On April 30th, 1895, this case was decided by the said Supreme Court, after a hearing, and the judgment and order of the District Court

were affirmed. Thereafter, and on December 7th, 1895, on a rehearing of said cause, said Supreme Court reversed its former decision and the decision of said District Court, and held that the act of 1893 applied to the mortgage of plaintiff in error; that she was entitled to only a certificate of purchase, and not to a deed; that defendant in error had the right to eighteen months' possession of the premises, with the right of redemption during that time, notwithstanding the fact that the mortgage was given over seven years prior to the passage of the law in question. The court also held that the application of the law of 1893 to the contract in question is not in violation of that portion of article one, section ten, of the Constitution of the United States, which ordains that "No state . . . shall pass any . . . law impairing the obligation of contracts."

The sole question involved in this case is as to whether the law above referred to is valid as to contracts in existence at the time of its passage, or void under the Constitution of the United States; and this last decision of the highest court in the State of Kansas being adverse to the rights and privileges claimed by

the plaintiff in error under the Constitution of the United States, this cause is brought to this court for a re-examination upon a writ of error.

REASONS FOR THE APPLICATION.

We ask the advancement of this case because the last decision rendered therein by the Supreme Court of the State of Kansas affects the interests of many thousands of persons residing within the State of Kansas, and a great number of people residing elsewhere; because it involves and affects property and interests amounting to many millions of dollars, unsettles great numbers of titles to real property, and will be productive of a vast amount of litigation. In its far-reaching results it is of vast public concern.

1. It affects or disturbs the title to almost all the real estate sold within the State of Kansas at judicial sale under judgments rendered since March 17th, 1893.

2. It unsettles the right of possession and the right to the rents and profits of nearly every tract of real estate so sold.

3. It affects the rights of the holder of every

mortgage upon Kansas real estate given prior to March 17th, 1893.

4. It affects the rights of the parties to every action for the foreclosure of a real-estate mortgage now pending in the State of Kansas.

The principal reason why this decision is so disastrous in its results to so many thousands of people, and affects such a vast aggregate of property and money, is because it overthrows what has been the well-settled law of this State from the earliest times to the date of the last decision in this case. Courts, lawyers, investors, business men of every class, and citizens of Kansas and elsewhere, have considered that the law of 1893 did not apply to pre-existing contracts. In the enormous foreclosure business of the State since March, 1893, the question of applying the statute referred to to pre-existing contracts has, so far as we know, seldom been raised: so far as we can learn only two of the inferior courts out of thirty-seven have held the law applicable; and these two courts had jurisdiction over only *five* sparsely populated western counties out of a total of one hundred and five counties in the State.

The course of the Supreme Court of the State of Kansas has been as follows:

In 1865, in the case of *Cusic v. Douglass*, 3 Kas. 123, it was held that the homestead exemption clause of the State Constitution applied to pre-existing contracts; but in the opinion on page 130 it is said:

"Much juridical discussion has been indulged in concerning what pertains to the contract and what to the remedy; and although it was at one time held that the law of the remedy might be changed to an almost unlimited extent without impairing what was considered the obligation of the contract, it is now decided that slight changes in the remedy will impair its obligation."

In 1871, in *Deering v. Boyle*, 8 Kas. 532 to 535, the court expressed its views at some length, in substance to the effect that the obligation of a contract could not legally be impaired by the State in any manner or to any extent.

In 1873, at the January term, in the case of *Bixby v. Bailey*, 11 Kas. 359, 368, the court said, referring to the redemption law of 1861:

"It is insisted that, under the law in force at the time of the decree and sale, the debtor had two years to redeem, and therefore the sheriff's deed was void. The note and mortgage were ex-

ecuted before the redemption law, and therefore unaffected by its provisions."

At the July term in 1873, in the case of *Ogden v. Walters*, 12 Kas. 282, 291, the court stated:

"At the time the mortgage was executed, in 1858, there was no law authorizing the redemption of land from a sheriff's sale, and the law of June 4, 1861, cannot have a retrospective operation, so as to apply to said mortgage."

In 1891 the court held, in the case of *Getto v. Friend*, 46 Kas. 24, 30, 31, that a statute limiting the rate of interest which judgments rendered after its adoption might bear, should not be applied to contracts previously made calling for a higher legal rate of interest, the previous law having provided that a higher rate of interest might be contracted for, and that judgments rendered thereon should bear the same rate of interest as the contracts upon which they were based.

At the July term, 1893, in the case of *Greenwood v. Butler*, 52 Kas. 424, the court decided that chapter 109 of the Laws of 1893 did not apply to sales made afterward upon judgments rendered previous to the taking effect of that act. In the opinion in this case the constitu-

tionality of this law, as applied to and tending to impair the obligation of pre-existing contracts, was discussed, and on pages 430 and 431 the court said:

"It cannot be said that a sale of lands with a right of possession remaining in the judgment debtor for a year and a half thereafter is the same thing as a sale with a right to immediate possession on confirmation of the sale. It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half. It diminishes the value of the lands to be sold by just exactly the value of the tenure, rent free, for a year and a half. The fact that the judgment would still draw interest does not affect the question as to the value of the security to be sold for its satisfaction."

In *Watkins v. Glenn*, 40 Pac. Reporter, 316, decided April 30th, 1895, the court held that said chapter 109 of the Laws of 1893 was void as to pre-existing contracts as impairing their obligation.

Relying upon the almost universal construction of the law, a large percentage, and probably a majority, of the mortgagees have purchased the property sold at foreclosure sales. Third parties have not bid unless they were

willing to pay more than the judgment, interest and costs; hence, the mortgagees bought, and bought low in order to save the officers' commission on the sale. In many cases *where the mortgagor was insolvent*, property worth several thousands of dollars was sold for about as many hundreds of dollars to the mortgagees, they taking the property with the expectation that it would be all they would ever receive on their judgment. Now this decision has come like a thunderbolt from a clear sky, and the mortgagors say: You must allow us to redeem for the small amount paid at the sale: and not only this, but in case possession has been obtained you must also account for the rents and profits since you have had possession.

Believing that the law of 1893 did not apply to pre-existing contracts, titles have been acquired at judicial sales in disregard of its provisions; have been approved by attorneys and transferred by warranty deeds; investors have loaned money upon such property; owners have contracted debts based upon such security and have made improvements upon their property without for a moment believing that they were in the slightest danger.

Since the last decision was made in this case by the Supreme Court of Kansas, parties are claiming that under the law as laid down therein the courts of the State have possessed no power since March, 1893, to provide in a decree of foreclosure that the owner of the property should be barred from and after the sale, and that such courts had no power upon confirmation of such sale to order the immediate issuance of a deed, or to give the purchaser immediate possession of the property. It is claimed that as there was a want of power to enter such decrees or to make such orders, the same are, so far as they conflict with the law of 1893, absolutely void; that while the sales may be valid, the sheriffs' deeds are void and purchasers thereunder or their grantees are and have been trespassers. What position the courts of Kansas will take upon these questions if they are compelled to meet them, we cannot say. The amount of litigation that is liable to grow out of this decision is enormous, as this court will see from the matters stated above and the facts given below. If the decision rendered is right, then the people should know it, that they may govern themselves accordingly;

if it is wrong, a speedy reversal by the only tribunal having that power would be of vast benefit to a great number of people.

From the United States Census Report of 1890 we find that the total number of real-estate mortgages outstanding in the State of Kansas at the time that census was taken was 298,884, and that the indebtedness secured thereby was $243,146,826. We have no means of ascertaining the number of mortgages in force on March 17th, 1893, or the amount secured thereby, but the percentage of change up to that time was probably not large. From the above figures we learn that the average size of a Kansas real-estate mortgage in 1890 was $813. The customary term for mortgage debts to run in the loan business of Kansas has been and is five years.

We have written to the clerks of the courts having original jurisdiction in mortgage foreclosure cases in each of the one hundred and five counties of the State, asking for information as to the number of foreclosure decrees rendered in those courts since March 17, 1893, and the number of foreclosure suits now pending therein. We have received replies from sixty-six clerks,

who inform us that in that number of counties there have been about 12,526 foreclosure judgments entered since March 17, 1893, and that there are now about 1,025 foreclosure suits pending in the same counties. In Shawnee county, which contains the city of Topeka, there have been two thousand seven hundred and fifty-three foreclosure judgments entered since the law of 1893 took effect, the amount of such judgments being $2,062,857.98.

For the foregoing reasons we respectfully but earnestly ask this court to grant us a hearing at some early convenient date, calling attention to the fact that there is but one question of law involved in this case; that but little time need be spent in the examination of the record, and that the labor of reaching a conclusion ought not to be great.

Leonard J. Fenny
Thomas F. Doran

Attorneys for Plaintiff in Error.

D. M. Valentine
A. L. Sheard

Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 863.

MARTHA BARNITZ, PLAINTIFF IN ERROR,

vs.

JOHN L. BEVERLY.

Affidavits in Opposition to Motion to Set Aside Order Advancing Case for Submission.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

C. A. Magaw, of lawful age, being first duly sworn, on oath says that he is a resident of the city of Topeka, Shawnee county, Kansas; that he is the C. A. Magaw who served the citation in this action upon defendant in error, John L. Beverly; that at the time he served the same upon the said John L. Beverly, to wit, in January, 1896, said John L.

Beverly stated to the affiant that he would send said citation to his attorney, E. A. McMath.

Affiant saith further that he was in the office of Ferry & Doran in the month of February, 1896, when one W. J. Scott was in the office, and heard said W. J. Scott say that defendant in error, John L. Beverly, sent the said citation to E. A. McMath, and that affiant further heard the said W. J. Scott state that after this case was advanced he sent one Alex. Findlay to the city of Topeka and had said Findlay purchase the interest of defendant in error, John L. Beverly, involved in this action, and obtained a power of attorney from said John L. Beverly to use his name in further proceedings in this action, and said Scott stated at said last-mentioned time that he would discharge said E. A. McMath as the attorney in this case.

Further affiant saith not.

C. A. MAGAW.

Subscribed in my presence and sworn to before me this 3d day of March, 1896.

[SEAL.] J. M. SHEAFOR,
Notary Public.

My commission expires May 13, 1897.

[Endorsed:] Martha Barnitz, plaintiff in error, *vs.* John L. Beverly, defendant in error. Affidavit of C. A. Magaw.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

Thomas F. Doran, of lawful age, having been first duly sworn, on his oath says that he is a member of the firm of

Ferry & Doran, of the city of Topeka, Shawnee county, Kansas; that E. A. McMath was the attorney of record in the above action when the same was pending in the district court of Shawnee county, Kansas, and in the supreme court of the State of Kansas; that the citation notifying the said John L. Beverly, defendant in error, was served upon the said John L. Beverly by one C. A. Magaw; that affiant heard one W. J. Scott say in the office of Ferry & Doran that said citation was sent by John L. Beverly, defendant in error, to E. A. McMath, his attorney at that time; that said E. A. McMath is the same E. A. McMath who consented to the advancement of this action and sent a telegram to D. M. Valentine, one of the attorneys for plaintiff in error, waiving oral argument; that the statement made by said W. J. Scott in the office of Ferry & Doran, in Topeka, Kansas, was made after said case was advanced, and that said W. J. Scott stated at that time, further, that he had sent one Alex. Findlay to Topeka and had him purchase for him the judgment of defendant, John L. Beverly, in this action, and obtained from him a power of attorney permitting the use of his name, John L. Beverly, in the further proceedings in this action, and that he (W. J. Scott) would discharge said E. A. McMath from this action; and further affiant saith not.

THOMAS F. DORAN.

Subscribed in my presence and sworn to before me this 3d day of March, 1896.

[SEAL.] J. M. SHEAFOR,
Notary Public.

My commission expires May 13, 1897.

[Endorsed:] Martha Barnitz, plaintiff in error, *vs.* John L. Beverly, defendant in error. Affidavit of Thomas F. Doran.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

Leonard S. Ferry, of lawful age, having been first duly sworn, on his oath says that he is a member of the firm of Ferry & Doran, of the city of Topeka, Shawnee county, Kansas; that E. A. McMath was the attorney of record in the above action when the same was pending in the district court of Shawnee county, Kansas, and in the supreme court of the State of Kansas; that the citation in this action to the said John L. Beverly, defendant in error, was served upon the said John L. Beverly by one C. A. Magaw; that affiant heard one W. J. Scott say in the office of Ferry & Doran that said citation was sent by John L. Beverly, defendant in error, to E. A. McMath, his attorney at that time; that said E. A. McMath is the same E. A. McMath who consented to the advancement of this action and sent a telegram to D. M. Valentine, one of the attorneys for plaintiff in error, waiving oral argument; that the statement made by said W. J. Scott in the office of Ferry & Doran, in Topeka, Kansas, was made after said case was advanced, and that said W. J. Scott stated at that time, further, that he had sent one Alex. Findlay to Topeka and had him purchase for him the judgment of defendant, John L. Beverly, in this action and obtained from him a power of attorney permitting the use of his name, John L. Beverly, in the further proceedings in this action, and that he (W. J. Scott) would discharge said E. A. McMath from this action; and further affiant saith not.

LEONARD S. FERRY.

Subscribed in my presence and sworn to before me this 3d day of March, 1896.

[SEAL.] J. M. SHEAFOR,
Notary Public.

My commission expires May 13, 1897.

[Endorsed:] 863. 16153. Martha Barnitz, plaintiff in error, *vs.* John L. Beverly, defendant in error. Affidavit of Leonard S. Ferry.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

STATE OF KANSAS, *Shawnee County,* } *ss:*

C. A. Magaw, of lawful age, having been first duly sworn, upon oath says that on the 4th day of March, 1896, affiant called upon John L. Beverly, defendant in error in the above-entitled action, and had a conversation with him with reference to the employment of E. A. McMath in this action; that said John L. Beverly stated that he sent E. A. McMath the citation which was served upon him when this case was taken from the supreme court of Kansas to the United States Supreme Court, and that he, John L. Beverly, stated at said time, further, that so far as he knows said E. A. McMath is still one of the attorneys for defendant in error in this action, and that he did not discharge said E. A. McMath as his attorney in this action.

Further affiant saith not.

C. A. MAGAW.

Subscribed in my presence and sworn to before me this 4th day of March, 1896.

[SEAL.] J. M. SHEAFOR,
Notary Public.

My commission expires May 13, 1897.

[Endorsed:] Martha Barnitz, plaintiff in error, *vs.* John L. Beverly, defendant in error. Affidavit of C. A. Magaw.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

STATE OF KANSAS, *Shawnee County,* } *ss:*

Leonard S. Ferry, of lawful age, having been first duly sworn, upon oath says that on the 4th day of March, 1896, affiant called upon John L. Beverly, defendant in error in the above-entitled action, and had a conversation with him with reference to the employment of E. A. McMath in this action; that said John L. Beverly stated that he sent E. A. McMath the citation which was served upon him when this case was taken from the supreme court of Kansas to the United States Supreme Court, and that he, John L. Beverly, stated at said time, further, that so far as he knows said E. A. McMath is still one of the attorneys for defendant in error in this action, and that he did not discharge said E. A. McMath as his attorney in this action.

Further affiant saith not.

LEONARD S. FERRY.

Subscribed in my presence and sworn to before me this 4th day of March, 1896.

[SEAL.] J. M. SHEAFOR,
Notary Public.

Commission expires May 13, 1897.

[Endorsed:] Martha Barnitz, plaintiff in error, *vs.* John L. Beverly, defendant in error. Affidavit of Leonard S. Ferry.

[Endorsed:] Case No. 16,153. Supreme Court U. S., October term, 1895. Term No., 863. Martha Barnitz, plaintiff in error, *vs.* John L. Beverly. Affidavits of C. A. Magaw, Thomas F. Doran, and Leonard S. Ferry in opposition to motion to set aside order advancing case for submission. Filed March 9, 1896.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1895.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*
} No. 863.

STATE OF TEXAS,
Harris County, } *ss:*

E. A. McMath, being duly sworn, says that he is a practicing attorney of the supreme court of the State of Kansas and is now temporarily residing in the city of Houston, Harris county, Texas.

Deponent further says that he has had entire charge of the proceedings and litigation conducted for or in the name of said John L. Beverly in the case in which was rendered the judgment of the supreme court of the State of Kansas, to reverse which the writ of error herein was obtained, from the time of the trial of such case in the district court of

Shawnee county, Kansas, and through all its subsequent stages in said court and in the Kansas supreme court, as will appear by an inspection of the record herein. After deponent had filed his motion for a rehearing of the case in the Kansas supreme court one Wm. J. Scott, of Kansas City, Mo., requested deponent that he be allowed to join this deponent in a brief and oral argument on such motion for rehearing, which request was made by him for the alleged reason of his interest in the legal question involved, and to which request this deponent assented. Deponent was unable on account of illness and absence from the State of Kansas to make oral argument on such motion for rehearing, and at Mr. Scott's own request, and with deponent's consent, such argument was made by said Wm. J. Scott; otherwise said Scott had no connection whatever with said case in either of the courts below, nor has he ever had any authority from deponent to take any other step or have charge of any other proceedings in said cause, nor could he have properly have received any such authority from said Beverly, as hereafter appears.

Deponent further says that before the decision of the Kansas supreme court was rendered in this case deponent had purchased from said John L. Beverly all his interest in the land involved in this litigation, which included all his interest in this suit, and had paid him in full therefor. As deponent did not desire to be substituted as a party to the suit he permitted said Beverly to retain the legal title to the property on his promise to make formal conveyance or deed of same to deponent whenever requested by deponent. Since the time of such purchase said Beverly has been and is still only the nominal party, and this deponent has been and still is the real party in interest.

Soon after the final decision of the Kansas supreme court in this case, December 8, 1895, deponent wrote said Beverly informing him thereof, and stating that deponent would soon prepare the deed of said property for Beverly to execute

to deponent, as per his agreement; also requesting said Beverly, in case a citation were served on him for an appeal of said case to the United States Supreme Court, to forward the same to deponent. On December 30, 1895, deponent received a letter from said Beverly in reply to deponent's above-mentioned letters to him, in his own handwriting and signed by him, and inclosing a letter which he stated he had received from said Wm. J. Scott. The following is a copy of said letter of said Beverly to this deponent so far as it relates in any way to this case:

"NORTH TOPEKA, KAS., 12, 27, '95.

"Mr. E. A. MCMATH, *Houston, Texas.*

"DEAR SIR:—Yours of 24th to hand & one I Recd some time ago. Would have answered it before this But was wating on your quitclaim deed you said youd send for my signature &c. There is a man in K. C. Mo. as you will see in this letter [referring to Scott's letter inclosed] that claimes to be your pardner, & has Writen me several letters. I havent reckognised him as a pardner of yours as yet. Havent made any recksileations [negotiations?] with him without your writen consent. The farm stands as it was when you were here & shal till you order it Different. Let me know if this man has anything to Doe with the case.

* * * * * * *

"(Signed) J. L. BEVERLY."

The case referred to in the foregoing letter was the above-entitled action; the deed referred to was the deed to be executed by Beverly to deponent of the property involved in this case, and "the man in K. C. Mo." referred to was Wm. J. Scott, whose letter to Beverly was inclosed in Beverly's said letter to deponent.

On January 10, 1896, deponent received another letter from said J. L. Beverly, of date January 8, 1896, in his handwriting and signed by him, in which he inclosed the citation issued in this case January 6, 1896, and served on him on that day. The following is a copy of all of said letter referring to this case:

"NORTH TOPEKA, KANSAS.

"Mr. E. A. McMATH, *Houston, Texas.*

"DEAR SIR:—I this day enclose you the notice of the Supreme Court. I held it a couple of days, thinking you would be in Topeka as you stated in your last letter. * * * I answered your last letter right away. Did you get it? I wrote on the back of the K. C. Man's letter who claims to be your Pardner in this case (I hope you will excuse me for doing such a unbecoming trick as Writing on Back of another letter). Now if there is anything you want of me in this case that I can do let me know. * * * I only hope We will beat them there as we did here. This case is watched by many. Will you be able to have it advanced on the Docket? Wel, I wont worry you any further. Would be glad to hear from you. * * *

"Yours respectfully,

"(Signed) J. L. BEVERLY.

"1003 Jackson St., N. T., Ks., Jan. 8, '96."

The "notice" referred to in the foregoing letter and inclosed therein was the citation issued in this case January 6, 1896, for his appearance in this Court, and served on Beverly on that day, and the "case" referred to in said letter was this case, as deponent had no other case in which said Beverly was a party, either nominally or otherwise.

Deponent has received no further communication from said Beverly since his said letter of January 8, 1896, and is wholly unable to understand the circumstances under which he could have been induced to make the affidavit, of which deponent has this day learned for the first time, purporting to have been sworn to February 13, 1896, by said Beverly, denying deponent's authority in this case, and believes the same to have been obtained from him, if at all, by misrepresentation or through a misunderstanding on his part.

Deponent further says that on the 18th day of January, 1896, at the request of Hon. D. M. Valentine, of counsel for the plaintiff in error in this case, who was then in Washington, D. C., deponent sent him a telegram, in substance consenting that this case be submitted on printed briefs at

the present term of this Court, and shortly thereafter deponent mailed a similar stipulation to the clerk of this Court, signed by W. C. Oliver, a counsellor of this Court, who, at this deponent's request, appeared as counsel for defendant in error; and deponent says that he not only had the implied authority from Beverly to continue in charge of this case in this Court, as found in the foregoing letters (if any such authority were necessary), but that he had previously given deponent the full and express authority to control this litigation so conducted in his name in all its stages; and, further, that as equitable owner of said Beverly's interest in the property involved by virtue of his aforesaid purchase, and as the successor to all his rights and interests in this case involved, this deponent had and still has and claims the right to fully control and direct this litigation on behalf of the defendant or in his name, without any reference to said Beverly's further directions.

Deponent further says that no one is properly authorized to represent the defendant in error in this Court except said W. C. Oliver and this deponent, and if the said Beverly has given any one such authority since the citation from this Court was served on him, it was after this deponent had acquired by purchase, as aforesaid, all his interest in this suit and when he had no further interest in the property involved.

E. A. McMATH.

Sworn to and subscribed before me this 6th day of March, A. D. 1896.

[SEAL.] H. H. MacNICOLL,
Notary Public, Harris County, Texas.

[Endorsed:] Case No. 16,153. Supreme Court U. S., October term, 1895. Term No., 863. Martha Barnitz, pl'ff in error, *vs.* John L. Beverly. Affidavit of E. A. McMath in opposition to motion to set aside order advancing case for submission. Filed March 9, 1896.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 863.

MARTHA BARNITZ, PLAINTIFF IN ERROR,

vs.

JOHN L. BEVERLY, DEFENDANT IN ERROR.

Reply to Affidavits by Plaintiff in Error.

We have endeavored to avoid embarrassing the Court with the question as to who represented defendant in error. When we notified the other side on March 2, 1896, of this motion they expressed themselves as entirely satisfied that the case should be argued orally. Now we find them, in objection to the motion, filing affidavits as to who represents defendant in error. This ought to be easily settled, and the defendant in error ought to know, and the following is his written authorization:

"MARTHA BARNITZ, *Pl'ff in Error*,
vs.
JOHN L. BEVERLY, *Def't in Error*.

"TOPEKA, KANSAS, *January* 31*st*, 1896.

"I hereby authorize William J. Scott to represent me as my attorney in the above-entitled cause in the Supreme Court of the United States.

"JOHN L. BEVERLY."

Mr. Beverly has sworn (page 2 of our motion) that Mr. McMath did not represent him; but as we recollect Mr. McMath's affidavit, filed by plaintiff in error, he says that long prior to the first decision in the supreme court of Kansas he purchased this property and allowed it to remain in Beverly's name for the purposes of this suit, and therefore that he is the owner of the equitable title.

Mr. McMath must be mistaken in this, as he wrote us from Houston, Texas, May 28, 1895. The portion of his letter referring to this matter is as follows:

"I was unable to make any oral argument in the case. I had gathered a large amount of material for brief, and had hoped to file a more elaborate brief than I did in the case, but the fact was that my client could not pay for the printing; and as I had to pay for what I had printed out of my own pocket, and owing to my removal, I had partly lost my interest in the question, *at least all pecuniary interest.* [Italics are ours.] I abbreviated my argument and did not present the question to my own satisfaction. * * * If I can find parties who will pay for printing, I would like to file a further brief of about 25 pages, endeavoring to upset the points made in the opinion of Judge Horton."

This was prior to his letter of June 14, 1895 quoted on page 5 of our motion. If this letter is true, Mr. McMath must be mistaken as to his ownership; but, however that may be, Mr. Alexander Findlay is the owner of the property involved in this suit by deed from Beverly for a valuable consideration, without notice, and also holds a power of attorney from Beverly relating to this suit, providing as follows:

"And the said John L. Beverly hereby irrevocably appoints and authorizes the said Alexander Findlay, as his sole representative, to prosecute, defend, and maintain any such litigation in the name of the said John L. Beverly, or in his own name to employ, discharge, or retain such counsel and attorneys as the said Alexander Findlay may consider necessary," etc.

Under this provision and by virtue of his ownership of the land, Mr. Findlay formally notified Mr. McMath that his services were not expected, and we were formally retained, although, as a matter of fact, we had been employed in the case since June 27, 1895, when Mr. McMath abandoned the case.

We learned in the last few weeks that the contract claimed by Mr. McMath, which he speaks of in his affidavit (without stating the terms thereof), was an oral agreement that if Mr. McMath won this case in the supreme court of Kansas he was to get the property. The record shows Mr. McMath lost the case, both in the district court and the supreme court of Kansas, and we won the case in the latter court on motion for rehearing after his abandonment of it.

We do not think this Court will give great consideration to an attorney who would take the whole subject of litigation as his fee in the case.

WILLIAM J. SCOTT,
Attorney for Defendant in Error.

UNITED STATES OF AMERICA:

William J. Scott, being duly sworn, upon his oath says that the matters and things set forth in the foregoing statement are true.

WILLIAM J. SCOTT.

Subscribed and sworn to before me this 12th day of March, 1896.

[SEAL.] JAMES D. MAHER,
Notary Public.

[Endorsed:] Case No. 16,153. Supreme Court U. S., October term, 1895. Term No., 863. Martha Barnitz, pl'ff in error, *vs.* John L. Beverly. Reply to affidavits by plaintiff in error. Filed March 12, 1896.

APR 4 1896
JAMES H. McKENNEY,
CLER

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

No. 863.
OCTOBER TERM, 1895.

LEONARD S. FERRY,
THOMAS F. DORAN,
Attorneys for Plaintiffs in Error.

D. M. VALENTINE,
A. A. GODARD,
Of Counsel.

CRANE & CO., TOPEKA.

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

MARTHA BARNITZ, *Plaintiff in Error*,
vs.
JOHN L. BEVERLY, *Defendant in Error.*

No. 863.
OCTOBER TERM, 1895.

STATEMENT OF THE CASE.

FACTS.

1. On November 1, 1885, George A. Kirkland executed a negotiable promissory note to Martha Barnitz for $1,500, payable in five years, with interest payable semi-annually at the rate of eight per cent. per annum, and after maturity at the rate of twelve per cent. per annum. For the interest for five years, ten interest coupon notes attached to the principal note, for $60 each, payable consecutively at intervals of six months from the date of their execution until Nov. 1, 1890, were given. All the notes were secured by a mortgage of the same date upon a quarter-section of land in Shawnee county, Kansas. (Printed

record, p. 4, *et seq.*) In the principal note it was stipulated, among other things, as follows:

"It is expressly declared and agreed that this note and the coupons hereto attached are made and executed under and are to be construed by the laws of the State of Kansas in every particular." (Printed record, p. 7.)

And it was stipulated in the mortgage, among other things, as follows:

In case of default on the part of the mortgagor "it is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to the immediate possession of the premises and the rents, issues and profits thereof." (Printed record, p. 9.)

And it was also stipulated therein that—

"The said party of the first part [the mortgagor] for said consideration does hereby expressly waive an appraisement of said real estate." (Printed record, p. 9.)

All the coupon notes were paid except the last one, which became due on November 1st, 1890. The principal note and the last-mentioned coupon note not being paid, this action was commenced on January 21st, 1893, in the District Court of Shawnee county, Kansas, by Martha Barnitz, to recover on said notes and for the foreclosure of

the mortgage. John L. Beverly and others were made parties defendant. (Printed record, p. 4, *et seq.*)

On July 7, 1893, a personal judgment was rendered as against such of the defendants as were liable thereto, for the sum of $2,113.46 debt and $44.95 costs, and against all the defendants for the foreclosure of the mortgage and the sale of the mortgaged premises. (Printed record, pp. 12 to 14.) No personal judgment was rendered against Beverly. Appraisement having been waived, the judgment provided for a stay of execution for six months. The judgment also provided that it should draw interest at the rate of twelve per cent. per annum. On January 9th, 1894, an order of sale was issued, (printed record, p. 15,) and on February 12th, 1894, the mortgaged property was sold thereunder at sheriff's sale to Martha Barnitz, for the sum of $2,000. (Printed record, p. 16.) On February 16, 1894, a motion was filed in the District Court for the confirmation of the sale, and this motion came on for hearing on February 26, 1894, when Beverly appeared and showed to the court that he was the owner of the premises and in the possession thereof in good faith by a tenant, and asked the

court to order the sheriff to execute to the purchaser only a certificate of purchase as provided for by chapter 109 of the Laws of Kansas of 1893. (Printed record, pp. 17 to 19.) The sale was confirmed and Beverly's motion was overruled, and the court ordered that the sheriff should execute to the purchaser Martha Barnitz a deed for the premises, holding that said chapter 109 could not legally apply to mortgage sales where the mortgage had been executed before the act took effect, and holding that the laws in force when the notes and mortgage were executed, governed. (Printed record, p. 19.) John L. Beverly then, as plaintiff in error, took the questions arising on this ruling of the District Court to the Supreme Court of the State on petition in error and a case made for the Supreme Court. (Printed record, pp. 2 to 22.) On April 30, 1895, the Supreme Court affirmed the judgment and rulings of the District Court. (Printed record, pp. 23 to 25. *Beverly v. Barnitz,* 55 Kas. 451; 40 Pac. Rep. 325.)

Afterward a motion for a rehearing was filed in the Supreme Court, and on December 7, 1895, the Supreme Court reversed and set aside its former decision and judgment, and reversed the

judgment and ruling of the District Court, and directed that a sheriff's deed should not be executed to the purchaser, but that only a certificate of purchase as provided for by chapter 109 of the Laws of 1893 should be issued; (printed record, pp. 25 to 41. *Beverly v. Barnitz*, 55 Kas. 466; 42 Pac. Rep. 725); and this last decision of the Supreme Court of Kansas is the one which we now ask to have reversed by this court. The final order and judgment of the Supreme Court of Kansas which we now seek to have reversed, (omitting title,) reads as follows:

"Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered and adjudged that the said motion be allowed; that the judgment of affirmance heretofore entered be vacated and set aside; and that the judgment of the court below overruling the motion of plaintiff in error for the issue of a certificate of sale instead of a deed be reversed, and that this cause be remanded with the order that the court below direct the issuance of a certificate of sale, as provided by chapter 109 of the Laws of 1893, and in accordance with the views of this court as expressed in its written opinion filed herein. It is further ordered, that the defendant in error pay the costs of this case in this court, taxed at $—; and hereof let execution issue.

MARTIN, C. J., delivered the opinion of the court.

ALLEN, J., concurring.

JOHNSTON, J., dissenting." (Printed record, p. 26.)

STATUTES.

As a part of this statement, we here give the statutes involved in the case so far as it is necessary to quote them. They are as follows:

[LAWS OF 1893, CHAPTER 109, SECTIONS 1, 2, 23, 24, 25 AND 26.]

"SECTION 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of costs up to said date, stating that unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: *Provided*, That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"SEC. 2. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs, and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be

six months from the date of sale, and all junior lien-holders shall be entitled to three months to redeem after the expiration of said six months."

"SEC. 23. Real estate once sold upon order of sale, special execution, or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for.

"SEC. 24. The holder of the certificate of purchase shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same; but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title.

"SEC. 25. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanics' lien, or other lien, whether special or general, and the terms of redemption shall be the same.

"SEC. 26. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular

and in conformity with law and equity, shall confirm the same and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in section 1 of this act."

ERRORS.

2. The errors of the Supreme Court of Kansas of which we complain were all committed by that court in rendering the above-quoted final judgment and order on December 7, 1895, (printed record, p. 26,) and were based upon the erroneous theory entertained by that court, that the Legislature has the power to pass valid laws injuriously affecting pre-existing contracts, and that said chapter 109 of the Laws of 1893 is valid as to pre-existing contracts; and the above errors were based upon this erroneous theory notwithstanding the fact that said chapter 109 is in contravention of section 10, article 1 of the Constitution of the United States, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts." Such errors of the Supreme Court of Kansas in detail are as follows:

First, In reversing and setting aside its prior decision and judgment in this case.

Second, In reversing the judgment of the District Court.

Third, In refusing to affirm the order and judgment of the District Court.

Fourth, In ordering and directing that only a certificate of purchase as provided for by chapter 109 of the Laws of 1893 should be issued to the purchaser, and not a sheriff's deed for the premises, as provided for by the laws of Kansas in existence when the notes and mortgage were executed.

Fifth, In holding that said chapter 109 of the Laws of 1893 is constitutional and valid as applied to notes and mortgages executed before said chapter took effect.

QUESTIONS.

The principal question involved in this case, stated in general terms, is as follows: Is not the act of the Legislature of Kansas, chapter 109 of the Laws of 1893, so far as it applies to mortgage contracts entered into before the act took effect, unconstitutional and void as being in contravention of section 10, article 1, of the Constitution of the United States, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts"?

Or, to state this principal question with greater fullness and accuracy and in greater detail, it is as follows:

Where under existing law the holder of a real-estate mortgage has the right upon foreclosure and judgment to have the entire mortgaged property sold for the satisfaction or partial satisfaction of his judgment and the mortgage debt, and to have the sale immediately confirmed and a sheriff's deed conveying absolute and unlimited title executed and the purchaser placed in the immediate possession and enjoyment of the property, and where no law exists for the redemption of any real estate sold at any judicial or sheriff's sale, may the Legislature, notwithstanding said section 10, article 1, of the Constitution of the United States, pass a valid act with reference to foreclosure sales afterward made to enforce pre-existing mortgage contracts, which act will give to the owner of the real estate sold on the mortgage foreclosure sale, and sold for less than the mortgage debt, the authority to retain the possession of the mortgaged property for eighteen months' additional time after the sale, and to receive and enjoy the rents, issues and profits thereof for that period of time, without paying anything

therefor, and also give him the said eighteen months' time within which to redeem the property from the mortgage debt and the judgment and the sale, provided he chooses to redeem, so that the property can never again be sold on that judgment or be used in payment or part payment of the remainder of the mortgage debt, and give him this privilege of redemption upon the condition that within the eighteen months he pay the amount for which the property was sold, with interest, taxes and costs, the interest to be paid at possibly a less rate than was provided for by the mortgage contract and the judgment?

Or, to state the question in still a different form, it is this:

Where, by a mortgage contract, the whole of an estate is pledged as a security for the payment of a debt, is it a contract, and may the obligation thereof be impaired by a subsequent act of the Legislature releasing the debtor, the mortgagor, from his obligation to furnish the whole of such estate as security for such debt, and permitting him in lieu of his contract to furnish only a portion of such estate as security, thereby rendering the security less valuable, where it is already inadequate for the payment of the debt?

APPLICATION OF THE STATUTE.

It is admitted by all the parties that said chapter 109 of the Laws of 1893 does not and cannot legally apply to judicial or sheriff's sales, (1) where the sale took place and was confirmed before the act took effect, or (2) where the sale alone took place before that time, or (3) where only the judgment was rendered before that time and the sale was made at a subsequent time. (*Greenwood v. Butler*, 52 Kas. 424.) *In all the above cases* a sheriff's deed conveying the property sold should be executed immediately after the confirmation of the sale, and *in all other cases* said chapter 109 provides and the Supreme Court of Kansas in the last decision of this case held, that after the confirmation of the sale only a certificate of purchase or sale, and not a deed, should be issued to the purchaser, and that the property sold should be subject under said chapter to be redeemed from the sale, from the judgment and from the debt, at any time within eighteen months after the sale, and that after the said eighteen months had expired, if no redemption had taken place in the meantime, a sheriff's deed should be issued. We claim that the statute providing for a certificate of purchase and redemption as applied to pre-existing mortgage contracts is unconstitutional and void as aforesaid.

ARGUMENT.

I.

Bronson v. Kinzie.
Nature of a Kansas Mortgage.
Rights Under It.—Sale.—Deed.

1. It seems to be admitted by the other side and by the court below, (55 Kas. 485; 42 Pac. Rep. 731,) that if Kansas mortgages were like common-law mortgages or Illinois mortgages, the case of *Bronson v. Kinzie*, 1 How. 311, and other cases hereafter cited, would control, and that the aforesaid act of 1893, if applied to pre-existing mortgages, would be unconstitutional and void. But to take this case out of the foregoing decisions, an attempt is made to greatly belittle and underrate Kansas mortgages, and to make them substantially nothing. We think, however, that they are real and substantial things.

First. They are liens upon the real estate which they cover. When a Kansas mortgage is foreclosed and the land sold and a sheriff's deed executed, the mortgage makes the deed relate back

as a conveyance beyond the deed, the sale, the judgment, the commencement of the action, and to the original creation of the mortgage, so as to destroy all intervening conveyances, liens and incumbrances relating to the property, and makes the deed give title paramount to the purchaser.

Second. A Kansas mortgage also, to some extent, constitutes an alienation of the estate which it covers. It has been held by the Supreme Court of Kansas from the beginning, that under that provision of the constitution (Art. 15, Sec. 8) which says that the homestead "shall not be *alienated* without the joint consent of husband and wife, when that relation exists," a mortgage of the homestead executed by either spouse alone is utterly void, for the reason that it constitutes a conditional or incipient alienation of the estate. Among the cases, see:

Morris v. Ward, 5 Kas. 239.
Dollman v. Harris, 5 id. 597.
Howell v. McCrie, 36 id. 636.

Third. Under the laws of Kansas as they existed prior to the passage of the act of 1893, the holder of a mortgage had the right through the courts and by a foreclosure proceeding to sell the *entire* mortgaged property *completely* and *absolutely*

and put the purchaser into the possession and enjoyment thereof *immediately.* Is not this an important and valuable right? Under the act of 1893, however, nothing can be sold except a mere possibility, a contingency, or at most an interest in the property not higher in character than a contingent remainder. And is a contingent remainder as valuable as a full title with the complete possession of the land? Under the act of 1893 the purchaser may never get the title or the possession. But if he were to get the same it would be only at the end of eighteen months, and after an intervening estate of eighteen months' duration had already had its being and passed out of existence, which intervening estate he could never get. And would not this intervening estate be worth something? It will therefore be seen that under the new law the holder of the mortgage cannot have the whole of the estate sold even upon a contingency, but only that fraction thereof remaining after a prior estate of eighteen months' duration has been carved out and has passed away and gone. Would not the use of the property for this eighteen months be worth something? The right to the use of property is property itself. And if this use of the

mortgaged property which the holder of the mortgage could under prior statutes have sold and transferred to a purchaser at a sheriff's sale were the only security for the mortgage debt, then even it alone would be worth something and could be sold for something to aid in satisfying the mortgage debt, if it were permitted to be sold. And it would be valuable whether considered alone or in connection with the remainder of the estate. In the case of *Greenwood v. Butler*, 52 Kas. 424, 430, 431, Mr. Justice ALLEN, in delivering the opinion of the court, used the following language:

"It cannot be said that a sale of lands, with a right of possession remaining in the judgment debtor for a year and a half thereafter, is the same thing as a sale with a right to immediate possession on confirmation of the sale. It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half. It diminishes the value of the lands to be sold by just exactly the value of the tenure, rent free, for a year and a half. The fact that the judgment would still draw interest does not affect the question as to the value of the security to be sold for its satisfaction."

Under the old law the holder of the mortgage could have the *whole* of the estate sold *absolutely*,

but under the new law he can have only a fraction thereof sold, and that sold only upon a contingency; and this although the whole of the estate was pledged by the mortgagor as a security for the mortgage debt when the mortgage was executed.

2. We think we have shown that a Kansas mortgage is of some value, and of more value under the laws as they existed prior to the passage of the act of 1893 than under that act. And further, we do not think that the distinctions between a common-law mortgage and a Kansas mortgage can possibly make any difference so far as this case is concerned. One is a transfer of title in law, though only a security in equity, and as presented in the case of *Bronson v. Kinzie.* The other in both law and equity creates a lien upon the property, is a security and a conditional alienation of the property from the mortgagor, and under the laws existing at the time of the execution of such a mortgage, which are a part of the mortgage contract, and for condition broken, and by foreclosure proceedings, the conditional alienation may be converted into a complete and absolute alienation of the estate and a transfer of the entire title, which title will

relate back to the time of the execution of the mortgage and destroy all intervening titles or interests. But even if a common-law mortgage were much more valuable than a Kansas mortgage, still, may the obligation of the contract as to one be protected and as to the other be impaired? May the obligation of a contract relating to title be protected while that relating to liens or other valuable interests be impaired? Must the obligation of a contract involving a large amount of either money or some other valuable thing be protected, while that concerning a smaller amount be impaired? We think that the obligation of a legal contract *must in all cases be protected* and never impaired.

3. The claim made by the other side and by the lower court, that a mortgage is not what it appears to be upon its face, (55 Kas. 481; 42 Pac. Rep. 730,) but that it is what the laws of the State or country when and where it is executed permit it or force it to be, does not help the other side, as we think. In fact, such claim is directly opposed to the whole tenor and effect of the argument of the other side, that a contract never includes any of the laws of the State or country where the contract is made unless it in terms ex-

pressly says so, but is simply and strictly what its own literal terms taken alone would make it to be. We claim that the laws of this State, existing when the present mortgage was executed, entered into the mortgage contract and are a part thereof, (see cases hereafter cited, p. 32 of this brief,) and while such laws largely vary the meaning of the literal terms used in the mortgage, yet the real mortgage contract is just what its own terms and the existing laws when the contract was made, *all taken together* and construed together, would make it to be, and no new law could be passed that would have the legal effect of impairing the obligation of this contract as thus brought into existence. We also believe that an instrument in writing might be so drawn and executed as to make it constitute not only a mortgage but more than a mortgage. It might also embody a lease, giving to the mortgagee as lessee the possession of the property with the right to the rents and profits thereof; but this has nothing to do with this case. And what have the other side to say with reference to section 1 of the mortgage act? (General Statutes of 1889, par. 3884.) Said section reads as follows:

"In the absence of stipulations to the contrary, the mortgagor of real property may retain the possession thereof."

See the stipulations contained in the notes and mortgage in the present case; (page 2 of this brief.)

May not the parties stipulate that the mortgagee may take the possession of the mortgaged property as was stipulated in this case? (Page 2 of this brief.) And with reference to such or similar stipulations, and considering said section 1 of our mortgage act, can it reasonably be said "It is vain," "It is as nothing," "It is a waste of words," or "void"? May all such stipulations be treated "as if they were not"? (See 55 Kas. 481; 42 Pac. Rep. 730; printed record, p. 35.)

4. But, returning to the case of *Bronson v. Kinzie*, let us examine further as to the differences between that case and this, and see how material the differences are and in whose favor they are. The new law in the former case gave a period of fifteen months after the sale for a redemption, and prohibited the final extinguishment of the mortgagor's or owner's interest in the estate for that period of time, while the new law in this present case gives the longer period of eighteen

months after the sale for the redemption, and for the final extinguishment of the mortgagor's or owner's interest in the property. Besides, it does not appear that the purchaser in the *Bronson v. Kinzie* case was deprived by the new law of the possession of the property or of the rents and profits thereof for any period of time after the sale — and probably he was not; while in the present case the purchaser is by the new law deprived of the possession and the rents and profits for the period of eighteen months after the sale. And it does not appear that there was any diminution of the rate of interest by virtue of the new law in the *Bronson v. Kinzie* case as there probably is by virtue of the new law in the present case. We shall speak further with regard to interest hereafter. The *principal right* that was infringed by the new law in the *Bronson v. Kinzie* case was the right of the mortgagee to a sale of the *entire mortgaged estate*, and because of the infringement of that right the new law was held to be nugatory. The new law in the present case is subject to the same objection, in a greater degree, and to other objections. Is not the new act in this case a much greater infraction upon the aforesaid constitutional provision than the new

act in the *Bronson v. Kinzie* case? And yet the new act in that case was held to be unconstitutional and void. *A fortiori*, the new act in the present case should be held to be unconstitutional and void so far as it applies to past mortgages. The case of *Bronson v. Kinzie* has been reviewed and confirmed by the Supreme Court of the United States in various subsequent cases; among which see:

McCracken v. Hayward, 2 How. 608, 612, 613, 614.

Howard v. Bugbee, 24 How. 461 to 465.

In the case last cited it is held as follows:

"A law of a State authorizing a judgment creditor of a mortgagor at any time within two years after the sale under a mortgage, to redeem the land from the purchase, on paying the purchase-money, with interest, and charges, as to a mortgage executed before the passage of the law providing for the redemption, is inoperative and void, as impairing the obligation of the contract."

II.

QUESTIONS AS TO THE POWER OF THE LEGISLATURE, AND THE OBJECTIONS THERETO.

1. The question whether the Legislature can postpone the time for a foreclosure sale to become effective is one of power. If the Legislature has

the power to postpone the time for the sale to become effective for eighteen months, it could of course postpone the same for eighteen years, or for any longer period of time, which would virtually destroy the mortgage security and render it worthless. Eighteen months' postponement would impair the security, but a longer period of time would do a greater wrong. The purchaser's contingent interest in the property, if a purchaser could be found, might not be worth much. But who would want to be a purchaser under such circumstances? Would anyone want to bid at a sheriff's sale, considering the great uncertainties as to whether in the end he would ever get the land or whether it would be redeemed? He might reasonably infer this much, however: If the property should advance in value it would be redeemed and he would lose the profits; but if it should decline in value it would not be redeemed and he would have to stand the loss. Many cases illustrating this and other consequential injustices have already occurred since the last decision in this case.

One case, though not in the record, we will mention. In a mortgage foreclosure case in Shawnee county, a judgment aggregating about

$76,000 was rendered upon mortgages executed prior to the passage of the act of 1893, and the mortgaged property, a large office building situated in the city of Topeka, was ordered to be sold and the proceeds applied in payment of the foreclosure judgment. Following the old law and the former decisions of the Kansas Supreme Court, a stay of six months was taken before sale. The building has at the present time a cash rental value of about $1,000 per month. There is no probability that the property will at the present time sell for anything like the mortgage indebtedness; and yet if the new law is held to apply to the sale of the property, the mortgagor, an insolvent corporation, which can in no event ever redeem the property, will retain possession thereof and will receive the rents and profits of the building for a period of eighteen months additional after the sale, a right it did not possess under the old law, and will in that time collect, in rents, the munificent sum of $18,000; it will in effect receive out of the security pledged for the payment of the mortgage indebtedness, just $18,000, less, of course, the running expenses, which, though great, will still leave in its possession a gratuity of many thousands of dollars transferred to it

from the security pledged to the payment of the mortgage debt, by act of the State Legislature, without consideration, and it seems to us, in direct violation of the inhibition of the Constitution of the United States. And this notwithstanding the fact that the property will go begging for bidders at less than the mortgage indebtedness, and notwithstanding the fact that the mortgagee, to get anything out of his investment, must himself be the purchaser at the sheriff's sale, and must become the ultimate owner of the property on account of the insolvency of the mortgagor and its consequent inability to redeem. Besides, there is no inducement to the mortgagor, while enjoying the fruits of this temporary possession, to keep the property in repair. Yet the other side would have us believe that the obligation of the original contract has not been impaired; that the possession of the property after sale is a matter between the purchaser and the mortgagor.

It will be hard to convince the mortgagee, who has lost his money and who by such construction of the laws of 1893 must lose many thousands of dollars additional from his security, that the obligation of his contract has not been impaired. It would seem to us that it will be hard to convince

anyone that in this case the remedy alone has been affected and not the obligation of the contract. Yet what is true of this case is true of every other, to a greater or less degree.

2. And further as to the power of the Legislature. If the Legislature has the power to divide the mortgaged estate into two parts, as to time, and to permit only the second or last part to be sold and to permit the owner to retain the other part, it would of course have the power after making such a division to permit only the first part (the eighteen months' estate in this case) to be sold and permit the owner to retain the remainder; that is, to retain all after the eighteen months' estate had expired. And if the Legislature has the power to divide the mortgaged estate into two parts as to time and permit only one part to be sold, it would of course have the power to divide the mortgaged estate into two parts territorially and permit only one part to be sold, and that part might be only a small fraction of the entire estate. In other words, the Legislature might permit a line to be drawn anywhere through the estate dividing it into two parts territorially and might permit only one part to be

sold, and that part the smaller one, and might permit the owner to retain the remainder. And if the Legislature may permit the estate to be divided in any manner and a part only of the estate to be sold and that sold upon a contingency of any kind, then it would have the power to provide for selling the same upon any other kind of contingency. If the Legislature may provide that as to past contracts the sale may be such that it could afterward be defeated by the owner's paying the purchase-money with interest. taxes and costs, the Legislature could also pro vide that the sale might be defeated by the owner's paying only the purchase-money or a fraction thereof, or by delivering to the purchaser a horse, or a dog, or anything else. The purchase-money with interest, taxes and costs is not the land, and, a few months after the sale or indeed at any time afterward, may not be a true criterion as to the value of the land. The prices of lands in new countries *are continually fluctuating.* Lands in Kansas have been purchased at low prices, surveyed into town lots and in a few months sold for ten, fifty or a hundred times their original cost. But when the "boom" collapses (using a Western phrase), the property may go down again

to somewhere near its original cost price. Evidently the mortgagee has a right to have the mortgaged property sold as the law provided, and as contemplated by the parties when the mortgage contract was made, and so sold that the purchaser may have the benefit of any advance in the price of the land after the sale.

III.

POWER AND JURISDICTION OF THE COURTS OF KANSAS AS TO MORTGAGE FORECLOSURES AND SALES.

1. There seems to be a belief on the part of the other side that the courts of Kansas in the exercise of some kind of shadowy equitable powers which they are supposed to possess, may transcend the law and grant what they might imagine to be equitable relief. For instance, that during times of great financial depression, the courts may relieve parties from the performance or from the results of their own legal contracts voluntarily made. This belief cannot be sound, and especially not with regard to the Supreme Court of Kansas.

The Constitution of this State provides that "the district courts shall have such jurisdiction in their respective districts as may be provided by law." (Constitution, Art. 3, Sec. 6.) And the

Supreme Court shall have "such appellate jurisdiction as may be provided by law." (Const., Art. 3, Sec. 3.) And there is no law in Kansas giving any such shadowy power or jurisdiction as above mentioned to either the district court or the Supreme Court. Neither can go beyond law or transcend law. Upon this subject, and indeed upon the other subjects presented in this case, we are entirely satisfied with the decision of the district court, and with the first decision of the Supreme Court, and object only to the last decision of a majority of the Supreme Court.

2. The foreclosure of a mortgage in this State is largely legal, in contradistinction to equitable. The action is commenced in the same way as a legal action; it must be tried before a jury if either party demands a jury; (*Clemenson v. Chandler*, 4 Kas. 558; *Bradley v. Parkhurst*, 20 id. 470; *State Journal Co. v. Commonwealth Co.*, 43 id. 99, 100;) it is tried upon oral evidence with some exceptions; the verdict is in the same form as at law; and the judgment is a personal judgment for the amount of the mortgage debt, with an order that the mortgaged property be sold and the proceeds applied in payment or part payment of such

debt. (Civil Code, section 399.) The mortgage debt is always enforced by a sale of the mortgaged property; the sales are always made by the sheriff, and no bids can be received after a sale is made, and the sale *must be confirmed* by the court unless there is fraud or irregularity requiring the sale to be set aside.

Moore v. Pye, 10 Kas. 246, 254.
Cowdin v. Cowdin, 31 id. 528.
Capital Bank v. Huntoon, 35 id. 577.
Babcock v. Canfield, 36 id. 437.

The confirmation is a *right* which the parties and the purchaser may claim. If the case is taken from the district court to the Supreme Court it is taken on petition in error, and a transcript of the record or a case made for the Supreme Court. A case made for the Supreme Court contains under our practice only "a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the Supreme Court." (Civil Code, sec. 547.) This present case was taken to the Supreme Court on a petition in error and a "case-made." A case taken to the Supreme Court is never retried by that court, but that court merely examines the record to deter-

mine whether the district court committed any material *error of law* or not. If the district court did not commit any material error of law, the Supreme Court must in all cases affirm the judgment or order of the lower court. The Supreme Court has no discretion to reverse or modify merely because of some supposed equities in the case.

IV.

CONTRACT. — OBLIGATION. — LAWS. — REMEDY. — SECURITY. — IMPAIRMENT.

1. A distinction is suggested by the other side as between the contract and the remedy given by law for its enforcement, and the "obligation" of the contract seems almost entirely to have been overlooked. Indeed, the other side seems to be oblivious to the fact that the "obligation" of a contract can never be impaired in contemplation of law, except where the remedy given by law for the enforcement of the contract is impaired. The two are inseparable, and must go or stay together. Of course there is a distinction between the contract and the remedy. But generally the remedy is included within the contract, sometimes expressly but generally only by implication. In this action the contract was embodied in a prin-

cipal note, ten interest coupon notes, a real-estate mortgage securing all the notes, *and the laws of the State then in existence*, providing for the enforcement of the notes and mortgage. And further: the principal note sued on provides, as heretofore stated, that—

"It is expressly declared and agreed that this note and the coupons hereto attached are made and executed under and are to be construed by the laws of the State of Kansas in every particular."

That of course means the present and existing laws when the contract was made. The laws giving a remedy to enforce a contract are, as we think, always impliedly if not expressly included within the contract. In the case of *Deering v. Boyle*, 8 Kas. 532, it is stated in the opinion of the court as follows:

"It is almost universally held that all the laws of the country in force at the time and place where the contract is made, which can materially affect the contract, enter into and form a part of the contract."

See also—

Greer v. McCarter, 5 Kas. 18, 22.
Mo. Pac. Rly. Co. v. Sharitt, 43 id. 378.

"The laws which exist at the time and place of

the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement.

"Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment.

"The obligation of a contract 'is the law which binds the parties to perform their agreement.'

"Any impairment of the obligation of a contract, the degree of impairment is immaterial, is within the prohibition of the constitution." (*Walker v. Whitehead*, 16 Wall. 314, 317, 318.)

"The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void." (*Edwards v. Kearzey*, 96 U. S. 595, 607; *Seibert v. Lewis*, 122 U. S. 284, 294.)

The case of *Bronson v. Kinzie* " was not decided on the effect and obligation of that covenant, but on the broad and general principle that a State law, which professedly provided a remedy for en-

forcing the contract of mortgage, effectually impaired the rights incident to, and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by law, which the law creates and attaches to contracts." (*McCracken v. Hayward*, 2 Howard, 614.)

"The obligation of a contract consists, in its binding force on the parties who made it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other, hence any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." (Cooley's Constitutional Limitations, [6th edition,] page 344.)

'The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the meantime. The remedy so provided becomes a part of the contract of the parties, and any change by statute substantially affecting it, to the injury of the mortgagee, is held to be a law impairing 'the obligation of the contract,' within the meaning of the Constitution of the United States." (2 Jones on Mortgages, § 1321.)

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. (4 Wall. 549.) And any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into the express terms of the contract, its legal construction, its validity, its discharge, or (within certain limits) the remedy for its enforcement." (3 Am. & Eng. Encyc. of Law, page 751, and cases cited.)

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." (*United States v. Quincy*, 4 Wall. 550.)

See also *Gunn v. Barry*, 15 Wall. 610 to 624 and the other cases hereafter cited.

2. But the constitutional inhibition protecting contracts from future injurious changes made by law, protects them in no other way, however, than by protecting their "obligation." It is "the *obligation* of contracts" only which is not to be impaired by a State; and not specifically either the contract or the remedy, and all that should be said upon the subject of the protection of contracts should have reference to such obligation. Now what is this obligation? It is certainly not merely a moral obligation, for no State could impair a moral obligation. A moral obligation may exist independent of law. It is evidently a legal obligation which is contemplated by the constitution. And surely a legal obligation cannot exist except as it exists in the law, is founded upon law and created by law. "The obligation of a contract in the constitutional sense, is the means provided by law, by which it can be enforced." (*Louisiana v. New Orleans*, 102 U. S. 203, 206.) In other words, the obligation of a contract is the legal duty founded upon the words and acts of the parties, coupled with the legal remedy given for its enforcement by the laws of the country when and where the contract is made. Therefore, to impair the remedy is usually if not

always to impair the obligation of the contract, which is really to impair the contract itself.

The following are some of the other definitions given of the constitutional meaning of the words "obligation of contracts":

"As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that State, and the rights which the mortgagee acquired in the premises depended upon the laws of that State. In other words, the existing laws of Illinois, created and defined the legal and equitable obligations of the mortgage contract." (*Bronson v. Kinzie*, 1 Howard, 311, 315.)

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened." (*Louisiana v. City of New Orleans*, 102 U. S. 203, 206, 207.)

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement." (*Louisiana v. Police Jury of Parish of St. Martin*, 111 U. S. 716, 720.)

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." (*Sturgis v. Crowninshield*, 4 Wheat. 197.)

See also *Gunn v. Barry*, 15 Wall. 610 to 624, and the other cases herein cited.

3. It is sometimes true that where a contract has to be enforced in another State or country where the laws and judicial systems vary from those where the contract was made, the holder of the contract may have to lose some of his remedies; for the laws and judicial systems of a country can have no extra-territorial force or operation, and cannot be carried or transported into a foreign jurisdiction. A party suing in another State or country has no power to compel the court in that State or country to adopt a remedy not provided for by the laws of such State or country, a remedy which never had any existence there. Indeed, such other State or country need not give any remedy at all, unless it chooses to do so. The foregoing is true whether the remedy is embodied in the contract by implication because the laws where the contract is made provide for such a remedy, or whether the remedy is expressly

written out in full in the contract. Another State or country will enforce only so much of a contract, whether in writing or otherwise, as can be enforced in its own tribunals under its own mode of procedure, and which is not in contravention of its own laws or public policy. The argument to which we are now replying is weak. The fact that a remedy cannot be transported from one State or country into another, does not at all prove that the State where the contract is made may so change its remedies as to impair the obligation of the contract.

4. It is also possible, (though we do not assent to it,) that where the mortgaged property is worth and will sell for more, or does sell for more than the mortgage debt with interest and costs, the change in the law so as to give a right of redemption where none before existed, does not materially affect the contract or its obligation. Such possibly was the case of *Insurance Co. v. Cushman*, 108 U. S. 51. See further as to this case, page 56 of this brief. It is possible that only where the mortgaged property, as in this case, is not sufficient to pay the mortgage debt, that a redemption act like that of 1893 if applied to past

contracts will be considered as so materially affecting and impairing the obligation of the contract as to be unconstitutional and void. Mr. Justice ALLEN in his dissenting opinion in the case of *Watkins v. Glenn*, (55 Kas. 417, 450; 40 Pac. Rep. 316, 325,) in which case the majority of the court held that the act of 1893 could not constitutionally apply to past mortgages, uses the following language:

"The only questionable feature of the law, which perhaps might be held invalid without affecting the other provisions, is that giving to the debtor the rents accruing between the time of sale and the execution of a deed thereunder. (*Insurance Co. v. Brouse*, 83 Ind. 62.) Where the security is found to be inadequate, possibly this provision ought not to be upheld as to past contracts. Where the security is adequate, I perceive no objection to the whole law."

5. But does not the impairing of the security in any case impair the obligation of the contract and the contract itself? Suppose the security is worth ten times the amount of the mortgage debt, then is it not made thus ample by the contract itself? Did not the parties contract that it should be thus ample? Is not that just what the mortgagee wanted and contracted for? And if the se-

curity is lessened or diminished in any particular or degree by outside interference, is not the contract and its obligation changed, altered, impaired? The security in the present case is inadequate, and perhaps it was rendered so wholly by the act of 1893. The property did not sell for enough to pay the judgment rendered in the case.

6. Under the act of 1893 a mortgage security which had existence before the act took effect is always diminished and impaired by the act, for the following reasons:

First. The mortgaged property *as a whole*, cannot be sold as formerly, nor can any part thereof be sold *absolutely* as formerly, but only a contingent interest in a remainder of the estate after a portion has been carved out, can be sold. There was no redemption after sale under the old law.

Second. The *possession and use* of the property for eighteen months cannot under such act be sold at all. For that period of time, the owner of the property always retains the possession, use and control of the property and all the rents and profits, and he alone is permitted to enjoy the same, and without in any manner ever accounting there-

for. See said chapter 109, sections 2, 24, 25. This was different under the former law. This of course diminishes the salable value of the property.

Third. The property cannot be sold so as to give to the purchaser *a deed of conveyance as soon as the sale is confirmed*, as formerly, but only a certificate of purchase. A certificate of purchase was never issued under the old law. A deed may be executed under the new law at the end of eighteen months, or it may never be executed, depending entirely upon whether the owner of the property (or some other person in his name) or some creditor redeems or not. Of course there are cases under the new law where a sheriff's deed may be executed as soon as the sale is confirmed, as, (1) where the sale was made and confirmed before the new act took effect, or (2) where the sale only took place before that time, or (3) even where only the judgment was rendered before the new act took effect although the sale was not made until afterward. (*Greenwood v. Butler*, 52 Kas. 424.) It will therefore be seen that sections 1, 2 and 26 have ample room for operation as to the execution of sheriffs' deeds,

giving to the act the exact construction for which we contend.

Fourth. The property cannot generally be so sold, under the act of 1893, that if the property should afterward be redeemed, the debt would draw the *same rate of interest* after the sale as the contract and the judgment provided. In this case the contract and judgment provided for twelve per cent. interest, but if anyone redeems the property after the sale, may he not do so under the present law by paying a less rate of interest? The interest law in force when this contract was made, so far as it is necessary to quote it, reads as follows:

"SEC. 5. All judgments of courts of record and justices of the peace shall bear interest from the day on which they are rendered, at the rate of seven per cent. per annum, except as herein otherwise provided.

"SEC. 6. When a rate of interest is specified in any contract, that rate shall continue until full payment is made; and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment; but in no case shall such rate exceed twelve per cent. per annum." (Compiled Laws of 1885, chapter 51, sections 5, 6.)

In 1889 the interest laws of Kansas were so

changed that by contract, interest may be stipulated for only at a rate not greater than ten per cent. per annum, and where the rate is not fixed by contract it cannot be greater than six per cent. per annum. (Gen. Stat. of 1889, chapter 51.) The Supreme Court of Kansas held, in the case of *Getto v. Friend*, 46 Kas. 24, 30, 31, that the interest law of 1889 could not constitutionally apply to contracts made before the law took effect; but the court as now constituted would in all probability overrule that decision, if it has not already done so by the last decision in this present case. We think it has in effect already done so.

The interest, therefore, on a debt such as the present mortgage debt, being diminished in case a redemption should take place, the property would of course not sell for as much as though the interest were to remain the same as provided for by the contract and the judgment; and where the security is already inadequate, as in this case, this diminishing of the interest to be eventually paid by the owner and to be received by the person who might become the purchaser, would render the security still more inadequate, and this to the injury of the judgment creditor,

whose interest it is that the security shall result in causing a payment of as much of the mortgage debt as is possible; and therefore this reduction of interest would impair the obligation of the contract.

7. It may also be a fact that the Legislature might abolish a law providing for imprisonment for debt, for imprisonment is not the performance of any contract nor compensation for its violation. But can the Legislature *release* property *pledged* for the payment of a debt? Can the Legislature release eighteen months' use of real estate *pledged* for the payment of a debt, when such use or what it would bring at a sale is actually necessary for the payment of such debt? If eighteen months' use could be thus released, then eighteen years' use or the use for any greater period of time could be. Indeed, the debtor could be allowed to retain and use his property all his life.

8. We admit that the laws of a country and all remedies given therein for the enforcement of debts, contracts or claims, may be changed by statute in any particular and to any extent or degree, provided the change does not in any manner or degree impair the obligation of contracts, nor

in any other manner violate any provision of the constitution. Thus: new courts may be created for the trial of causes, or the terms of the courts may be changed, or the procedure may in many respects be changed. The inhibition in the constitution is not against changes in the laws or remedies; nor is it *in terms* even against changes in contracts or the obligation of contracts, but is simply against "*impairing* the obligation of contracts." If the obligation of the contract is made better or not affected at all by the new law, the new law will not come within the constitutional interdiction, although it may change laws or remedies. Therefore, while changes may be made in laws and remedies, yet they can never be so made as to *impair* in any manner or degree the *obligation* of contracts.

V.

DECISIONS OF THE SUPREME COURT OF KANSAS.

The Supreme Court of Kansas upon questions of a similar character to the ones involved in this case has decided as follows:

In *Bixby v. Bailey*, 11 Kas. 359, 368, the court, referring to the redemption law of June 4, 1861, observed:

"It is insisted that, under the law in force at the time of the decree and sale, the debtor had two years to redeem, and therefore the sheriff's deed was void. The note and mortgage were executed before the redemption law, and therefore unaffected by its provisions."

In *Ogden v. Walters*, 12 Kas. 282, 291, the court stated:

"At the time the mortgage was executed, in 1858, there was no law authorizing the redemption of land from a sheriff's sale, and the law of June 4, 1861, cannot have a retrospective operation, so as to apply to said mortgage."

In *Cusic v. Douglass*, 3 Kas. 123, it was held, contrary to the decisions in the cases of *Edwards v. Kearzey*, 96 U. S. 595 to 611, and *Gunn v. Barry*, 15 Wall. 610 to 624, that the homestead exemption clause of the State constitution applied to pre-existing contracts; but in the opinion at page 130, the court used the following language:

"Much juridical discussion has been indulged in concerning what pertains to the contract and what to the remedy; and although it was at one time held that the law of the remedy might be changed to an almost unlimited extent without impairing what was considered the obligation of the contract, it is now decided that slight changes in the remedy will impair its obligation."

In *Deering v. Boyle*, 8 Kas. 532 to 535, the court expressed its views at some length, which were in substance that the obligation of a contract could not legally be impaired by the State in any manner or to any extent, and such views have been followed by the court ever since, until they were finally overturned by the recent decision of the court.

In *Getto v. Friend*, 46 Kas. 24, 30, 31, the court decided as heretofore stated. (Page 44 of this brief.)

In *Greenwood v. Butler*, 52 Kas. 424, 430, 431, the court stated as heretofore quoted, (page 16 of this brief,) and held that where the redemption law of 1893 took effect after the judgment was rendered but before the foreclosure sale took place, the redemption law did not apply to the sale. In effect the decision was that the obligation of the contract so included the fact of the sale that the sale must be made under and be governed by the old law, and that no redemption could afterward be had. This decision was by a unanimous court.

In *Pounds v. Rogers*, 52 Kas. 558, 560, 561, it was held that the sale of land for delinquent taxes under the statutes constituted a contract between the purchaser and the State, the terms of which

are found in the law then in force, and that "all matters relating to the sale and conveyance of land for taxes under any prior statute must be fully completed according to the laws under which they originated, the same as if such laws remained in force." This decision was also by a unanimous court.

See also the cases of *Watkins v. Glenn*, 55 Kas. 417, (40 Pac. Rep. 316,) and *Beverly v. Barnitz*, 55 Kas. 451, (40 Pac. Rep. 325,) in which cases it was held that the redemption law of 1893 could not legally or constitutionally apply to a mortgage foreclosure sale, where the mortgage was executed prior to the passage of the law, although the judgment and sale took place afterward. The last decision of *Beverly v. Barnitz*, overturning the foregoing decisions, is found in 55 Kas. 466, and 42 Pac. Rep. 725.

The foregoing decisions, going back to the early days of Kansas and continuing until December 7, 1895, when the last one was made, became a rule of contract of business and of property. All men of course relied upon them. All felt that they could do business and make contracts under them safely. But now all these decisions are overthrown and all this confidence destroyed. What

the Legislature may next do, no one can tell. People may contract and do business with reference to *existing* laws, for all men are presumed to know the law; but they cannot contract or do business with respect to *future* laws, for no one is presumed or required to know what the future laws may be.

VI.

DECISIONS. — QUOTATIONS. — UNITED STATES SUPREME COURT AND OTHER COURTS.

The following quotations in addition to those already given will show what have been the views of the Supreme Court of the United States from the beginning up to the present time with respect to the questions involved in this case:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." (*Bronson v. Kinzie*, 1 Howard, 316.)

"It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and in-

terests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." (*Green v. Biddle*, 8 Wheat. 1; *Bronson v. Kinzie*, 1 How. 316.)

"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it." (*Bronson v. Kinzie*, 1 How. 317.)

"It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the

business of life. It was undoubtedly adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result." (*Bronson v. Kinzie*, 1 Howard, 317, 318.)

"When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation of that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the par-

ties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed." (*Bronson v. Kinzie*, 1 Howard, 319.)

"In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. *The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.* There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of

the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." (*McCracken v. Hayward*, 2 Howard, 612.)

"This court held, in *Bronson v. Kinzie* (1 How. 319), that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited could not be done indirectly." (*Lessee of Gantly v. Ewing*, 3 Howard, 707, 717.)

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." (*Planters' Bank v. Sharp*, 6 Howard, 301, 327; *U. S. ex rel. Von Hoffman v. City of Quincy*, 4 Wall. 535, 553.)

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions

not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect, upon the contract of the parties, impairs its obligation." (*Green v. Biddle*, 8 Wheat. 1, 84.)

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened." (*Louisiana v. New Orleans*, 102 U. S. 203, 206, 207.)

"The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract, the Legislature has the control and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." (*Vial v. Penniman*, 103 U. S. 714, 720.)

"A statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period for redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." (3 Am. and Eng. Encyc. of Law, page 751, note 2, and cases cited.)

See also the following cases:

Ogden v. Saunders, 12 Wheat. 213, 327.
Ex parte The City Bank of New Orleans, 3 How. 292, 328.
Curran v. The State of Arkansas, 15 How. 304, 319.
Clark v. Reyburn, 8 Wall. 318, 321.
Butz v. City of Muscatine, 8 Wall. 575, 582, 583.
Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 637.
N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650.
Mobile v. Watson, 116 U. S. 289, 305.
Walker v. Boggess, (W. Va.) 23 S. E. Rep. 550, 551.
People v. Common Council, 140 N. Y. 300, 307.

VII.

CASES RELIED ON BY THE OTHER SIDE.

1. The case of the *Conn. Mutual Life Ins. Co. v. Cushman*, 108 U. S. 51, is greatly relied on by the other side. But that case cannot apply to this case. In that case the new statute did not diminish the duty of the mortgagor to pay what he agreed to pay, nor affect the time for its payment, nor affect any remedy which the mortgagee had, by existing law, for the enforcement of his contract. And it does not appear that the mortgagee's security was inadequate, or that the mortgagee was delayed in any manner in obtaining the *full payment* of the mortgage debt, but the contrary. And the result of the sale shows that the insurance company as mortgagee *received all that it was entitled to demand.*

2. The case of *Morely v. Lake Shore & M. S. Rly. Co.*, 146 U. S. 162, also greatly relied on by the adverse party, has nothing to do with the questions involved in this case. That was where the act of the Legislature had the effect to reduce the interest on a judgment rendered upon a cause of action in which *no interest had been stipulated for. There was no contract for interest.* In the opinion of the court the following language is used:

"He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the State chooses to prescribe."

3. The case of *Antoni v. Greenhow*, 107 U. S. 769, is also relied on by the other side. We have no fault to find with that case. In that case it is held that where a statute impairs the obligation of a contract it is void, and also held that a change of remedy where an ample remedy remains does not impair the obligation of the contract.

4. The case of *Curtis v. Whitney*, 13 Wall. 68, is also relied on by the other side. In that case it was held that a statute requiring a notice to a

person in the possession of land should be given before a tax deed for the land should be issued, did not impair the obligation of the contract of the purchaser. In that case the court says among other things as follows:

"In the case before us the right of plaintiff to receive her deed is not taken away, nor the time when she would be entitled to it, postponed."

No decision of the Supreme Court of the United States can be found which will justify the last decision made by the Supreme Court of Kansas in this case; but numerous decisions of such first-named court may be found which will require a reversal.

Respectfully submitted.

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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 863.

MARTHA BARNITZ, PLAINTIFF IN ERROR,

vs.

JOHN L. BEVERLY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error brings this case to this Court by writ of error to the supreme court of the State of Kansas to reverse an order and judgment of that court made and rendered December 7, 1895. The original action in this case was commenced in the district court of Shawnee county, Kansas, on the 21st day of January, 1893, by Martha Barnitz, as plaintiff, to recover judgment on certain notes made by one Kirkland November 1, 1885, and to foreclose the

lien of a mortgage executed by Kirkland at the same time as security for the payment of said notes, upon land in Shawnee county, Kansas. The judgment of the district court was rendered July 7, 1893, and included a personal judgment against three of the defendants for the amount of the debt and costs, a finding that the plaintiff had a lien upon the mortgaged premises for the payment of the debt, and an order that in case the defendants failed to pay the debt the mortgaged property should be sold in the manner prescribed by law and the proceeds applied, after payment of costs, to the payment of plaintiff's debt. The judgment further provided that upon confirmation of the sale of the premises "and upon the execution and delivery of the sheriff's deed therefor according to law" all of the defendants should be barred and foreclosed of all title to, lien upon, or equity of redemption in said lands, and the purchaser should be entitled to the possession of said premises. It was further especially provided "that this judgment shall operate in conformity to the decision of the (Kansas) supreme court as to the application of the redemption laws of 1893." (For judgment see printed Record, pp. 12–14.)

An order of sale was issued to the sheriff of Shawnee county January 7, 1894, in pursuance of the judgment, and on February 12, 1894, the mortgaged premises were sold at public auction by the sheriff to Martha Barnitz, the plaintiff in error, she being the highest bidder. A motion to confirm this sale was thereafter filed by the purchaser. John L. Beverly, the defendant in error, was at the date of the judgment and sale the owner of the mortgaged property and in possession thereof; and at the hearing of the motion for confirmation a motion was also duly filed and submitted on his behalf that upon confirmation of the sale the court should order that a certificate be issued by the sheriff to the purchaser under chapter 109 of the Laws of 1893. The district court denied the motion for the reason that the mortgage was executed before the enactment of the statute, and

ordered that the sheriff's deed be issued to the purchaser at once. The defendant Beverly duly excepted and took the question arising on this ruling to the supreme court of Kansas, which court, by its final order and judgment rendered December 7, 1895, reversed that part of the order of the district court which overruled the motion of Beverly, and ordered the court below to direct the issuance of a certificate of sale as provided by chapter 109 of the Laws of 1893. This order and judgment of the supreme court of Kansas the plaintiff in error now seeks to have reversed in this Court, and as reasen therefor alleges that said chapter 109 of the Laws of 1893, so far as it applies to mortgage contracts entered into before that act took effect, is unconstitutional and void, as being in contravention of section 10, article 1, of the Constitution of the United States, which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts."

Chapter 109, Laws of 1893—Kansas.

Prior to the enactment of chapter 109 of the Laws of 1893, and at the time when this mortgage was executed, judicial sales of real estate in Kansas could be ordinarily made only after appraisement and for not less than two-thirds of the appraised value. Where appraisement was expressly waived in any mortgage (as in this case) the defendant was entitled to a stay of execution for six months after judgment (Laws of 1872, ch. 660, sec. 1). After a judicial sale the court, upon being satisfied of its regularity, made an order confirming the sale and directing the officer to make a deed to the purchaser (G. S. 1868, ch. 80, sec. 458). The mortgagee acquired by his mortgage no right of possession whatever, and could only acquire the right of possession by becoming the purchaser of the property at the judicial sale (Seckler *vs.* Delfs, 25 Ks., 165). The purchaser at the sheriff's sale acquired no title and was not entitled to possession until the

sheriff's deed was executed in accordance with the order of confirmation (Robinson *vs.* Hall, 33 Ks., 139; Marshall *vs.* Shepard, 23 Ks., 321; Board of Education *vs.* Linscott, 30 Ks., 265). The statutes did not definitely specify the time when the right of redemption became barred, and it depended upon the terms and provisions of the judgment in each particular case whether redemption was actually barred at the date of the sale, or at the date of the order of confirmation, or at the date of the deed. By the judgment of the district court in this case, to which the plaintiff in error has taken no exception, it was specially provided that the defendant's right of redemption should be barred upon the confirmation of the sheriff's sale and execution of the sheriff's deed according to law.

Chapter 109 of the Laws of 1893 is a general act relating to all judicial sales thereafter to be made and regulating the procedure. It repealed the appraisement laws, which had proved cumbersome and expensive and which frequently worked great hardship to the creditor. It also repealed the stay laws, which prevented the sale of the property in such a case as this for six months after rendition of the judgment. It substituted for both a law regulating and defining the right of redemption, permitting all sales to be made at once after judgment without appraisement, and substantially providing that the defendant owner might redeem within eighteen months after sale on payment of the amount sold for, with interest, costs, and taxes, except in cases where the premises were not occupied in good faith, when his right of redemption was limited to six months from date of sale. The act further provided that where the property sold was subject to redemption the sheriff should execute a certificate of sale to the purchaser containing a description of the property and the amount of money paid by the purchaser, together with the amount of costs, and stating that unless the redemption is made according to law the purchaser or his assigns will be entitled to a deed. Under the new procedure

provided by this act the mortgagee under such a mortgage as is involved in this case could, on request, have a sale and realize on his security six months sooner than formerly, but the final deed could not be made nor the right of redemption finally barred for certain periods thereafter—in some cases six months and in other cases eighteen months. The new procedure applied to the foreclosure of such a mortgage would in no case extend the period required for the completion of all foreclosure proceedings and finally barring the mortgagor's rights more than one year beyond that required under the former procedure, and in many cases the extension of the time would be much less.

Argument.

PROPER LIMITATION OF THE ISSUES IN THIS COURT.

The argument of counsel for plaintiff in error is largely based upon their claim that the supreme court of Kansas has given an erroneous construction to mortgage contracts made in that State. They insist that the State court erred in its interpretation of the mortgage contract involved in this case and of the rights which the mortgagee obtained by it under the laws then existing, and then further insist that the obligations of that contract, as they argue it should be construed, have been impaired by the legislative enactment in question.

In reply to all this part of the argument of the counsel for plaintiff in error we respectfully submit that the construction given by the State court to the mortgage, and its interpretation of the contract and of the rights obtained under it by the laws then in force, are conclusive in this case. This Court will not assume jurisdiction of this case to determine whether the State court has erred in its construction of the contract or in its interpretation of the laws of that State. On this point it is enough to refer to the follow-

ing statements of the limitations of its jurisdiction found in the decisions of this Court:

> "It is the peculiar province and privilege of the State "courts to construe their own statutes, and it is no part "of the functions of this Court to review their decisions "or assume jurisdiction over them on the pretense that "their judgments have impaired the obligations of "contracts. The power delegated to us is for the re- "straint of unconstitutional legislation by the States "and not for the correction of alleged errors committed "by their judiciary." (Bank *vs.* Buckingham's Executors, 5 How., 317, 343.)
>
> "The State court may erroneously determine ques- "tions arising under a contract which constitute the "basis of the suit before it; it may hold a contract void "which in our opinion is valid; it may adjudge a con- "tract to be valid which in our opinion is void, or its "interpretation of the contract may in our opinion be "radically wrong; but in neither of these cases would "the judgment be reviewable by this Court under the "clause of the Constitution protecting the obligations "of contracts against impairment by State legislation "and under existing statutes defining and regulating "its jurisdiction, unless that judgment, in terms or by "its necessary operation, gives effect to some provision "of the State constitution or some legislative enactment "of the State which is claimed by the unsuccessful "party to impair the obligations of the particular con- "tract in question." (Water Co. *vs.* Easton, 121 U. S., 388.)

The inquiry in this Court is further limited to the particular provisions of the law to which the State court has by its decision given effect, and cannot properly be extended to those other provisions of the law which the State court has not passed upon and which are susceptible of independent operation or construction. It is intimated in the opinion of Chief Justice Martin in this case (see Record, p. 60), also in the opinion of Mr. Justice Allen in the case of Watkins *vs.* Glenn (55 Ks., 417), that possibly certain provisions of this

act might be invalid, and might be so held without invalidating the provisions which relate to the right of redemption. The question as to whether that feature of the law is valid which gives to the debtor the rents and profits accruing between the time of sale and the execution of the deed, and the further question of plaintiff's right to the appointment of a receiver in cases where the security is inadequate, were not before that court and were not decided. The only provisions of the law to which the State court has by its decision in this case given effect are those which relate to the right of redemption. The plaintiff in error is not here complaining of that part of the law which repealed the appraisement and stay laws, which changes were in her favor. The only questions before this Court are, first, whether the obligations of the contract involved in this case, as interpreted by the State court, have been impaired by those provisions of the law of 1893 which so changed the mode of judicial procedure in the foreclosure of this mortgage as to result in extending the right of redemption for a period not exceeding one year beyond the period limited under the former procedure; and, second, whether the plaintiff in error, as purchaser, can in this case raise the question as to the alleged impairment of the mortgage contract.

Assuming that the limitations of the inquiry in this Court are correctly stated above, we do not deem it necessary to reply to the extended argument of counsel for plaintiff in error that the State court erroniously construed the contract (the only inquiry in that connection being to ascertain what construction the court gave it); nor to their further argument that certain other features of the law as to possession and rents and appointment of receivers, which are not necessarily involved in the decision, would, if given effect, be an unconstitutional impairment of the contract.

TESTS TO BE APPLIED.

Outline of Argument.

We may assume that the principal and primary test of the constitutionality of this law is whether the law changes, alters, or impairs the *contract rights* secured by the terms of the mortgage, for it may be conceded at the outset that any such change, alteration, or impairment, however slight, would be unconstitutional; but if the new law acts on the remedy only, then the further and final test of its constitutionality is whether a substantial remedy be left.

We shall endeavor to maintain by our argument the following propositions:

1. That, according to the construction given by the statutes of Kansas, and by the decisions of its highest court, to mortgage contracts made in that State, this law did not change, alter, or impair any of the contract rights or obligations of the parties to this mortgage.

2. That the new law merely changed the mode of judicial procedure by which the right of redemption is barred in such case and acted solely on the remedy.

3. That modes of judicial procedure cannot be controlled by the contracts of parties, but may be changed, modified, or abrogated by the legislature in its discretion and to any extent, provided a substantial remedy be left.

4. That the right of redemption is a right which cannot be limited or restricted by contract. Hence a legislative enactment which regulates, defines, or reasonably extends this right cannot be held to impair the obligations of contracts.

5. That the new law leaves a substantial remedy for the enforcement of all the contract rights acquired by the mortgagee in this case under her mortgage.

6. That the rights of the plaintiff in error in this case are those of *purchaser* at the decretal sale, and must be determined by the laws in existence when the sale was made, and not by the terms of the mortgage, and that plaintiff in error cannot in this case raise the question as to the alleged impairment of the obligations of the mortgage.

KANSAS MORTGAGES: THEIR NATURE AND CONSTRUCTION.

In determining the question whether this law impairs the contract rights of the mortgagee, it is necessary to examine first of all the nature of the mortgage contract in Kansas and determine what rights the mortgagee acquired by her mortgage under the statutes then in force, and in order to properly distinguish this case from the case of Bronson *vs.* Kinzie, and certain other early cases decided by this Court, it is also necessary to keep in mind the nature of the mortgage at common law and the various modifications made by statute or by the construction of the courts in the different States where this question has arisen. At common law the mortgage was construed, according to its express terms, as conveying the legal title and estate and the absolute right of possession. In the course of time courts of equity, disregarding the express terms of the mortgage, gave to the mortgagor the right of redemption. Until about sixty years ago the common-law construction of the mortgage, as modified by this equitable rule as to the right of redemption, prevailed in every State in this country. Since the year 1830 the common-law construction of the mortgage has been further modified, either by statute or by the decisions of the courts. In some States the mortgage is held to convey the equitable title and estate, the legal estate and right of pos-

session remaining in the mortgagor until after default. In other States the mortgage is said to convey the legal estate and title, the mortgagor retaining only the equitable estate, or "an equity of redemption." In the majority of States the mortgagee is entitled upon default to the possession and rents and profits of the mortgaged property. In most of the States some of the features of the common-law mortgage are still retained, the mortgagee being considered to have either a legal or equitable estate, or at least the right of possession after default. In Kansas, however, all the features of the common-law mortgage have been long since wholly abrogated. Whatever may be the express terms of the mortgage contract, it does not in that State convey any title or estate whatever, either legal or equitable. It gives no right of possession. It gives no power to the mortgagee to sell upon default. It merely gives a lien on the mortgaged property which can be enforced, not in the manner stipulated in the contract itself, but only in accordance with the rules and practice of the court as the same may be prescribed by statute. Such is the construction placed upon the mortgage in suit by the State court in its decision in this case. (See Record, pp. 34, 35.) Counsel for plaintiff in error intimate that this construction is new and different from that heretofore given mortgage contracts in that State. On the contrary, it is the construction which has always been given by the highest court of that State since its organization. We quote from early decisions of that court as follows:

> "In this State the common-law attributes of mort-
> "gages have been by statute wholly set aside and the
> "ancient theories demolished. The mortgagee has a
> "mere security, creating a lien upon the property, but
> "vesting no title and giving no right of possession
> "whatever, either before or after breach. The statute
> "confines the remedy of the mortgagee to an ordinary
> "action and sale of the mortgaged premises. (Chick *vs.*
> "Willets, 2 Ks., 385; Waterson *vs.* Defoe, 18 Ks., 223.)
>
> "Although a stipulation in a real-estate mortgage

"may seem to give the mortgagee the right, after con-
"dition broken, to take possession of the mortgaged
"property and to take the rents and profits thereof, still
"such a mortgage gives only a lien upon the mortgaged
"property and the rents and profits, and this lien can
"be enforced only by an action brought in the district
"court the same as in other cases. Such a stipulation
"does not transfer the title to the rents and profits to
"the mortgagee." (Syllabus in Seckler *vs.* Delfs, 25 Ks., 159.)

It may be conceded without argument that if the mortgage involved in this suit could, by the laws or rules of the courts in force at the time of its execution, be construed according to its express terms as conveying a title or the right of possession or the right to the rents and profits as therein expressed, then the law of 1893 would operate to deprive the mortgagee of rights given her by the contract, and would therefore be unconstitutional. But as the stipulations contained in the mortgage as to title and possession and rents and profits were void and inoperative, and the only right which she acquired was a lien, to be enforced according to the due course of judicial procedure in the courts, it is clear that the new law did not change, affect, or impair any of her contract rights.

THE RIGHT OF REDEMPTION CANNOT BE LIMITED BY CONTRACT.

If, as we have seen, the parties to this mortgage could not include in it a valid contract for vesting title, or right of possession, or regulating the time or manner of sale, still less could they make a valid contract limiting the right of redemption. The right of redemption is inherent in every mortgage, notwithstanding any stipulation to the contrary. The parties to a mortgage contract cannot, even by express contract, limit or restrict this right, either by fixing a limit to the period or by any other condition whatever. Courts

have always strenuously resisted all attempts to abridge this right, and have uniformly set aside and disregarded every restriction, or limitation, or condition attempted to be placed upon this right by contract. This rule has been stated by numerous courts and eminent authorities in various forms, but all recognizing the same general principle:

> "It is an established rule that a mortgagor can never "provide at the time of making a loan for any event or "condition on which the equity of redemption shall be "discharged and the conveyance made absolute; and "there is great reason and justice in this rule, for neces- "sitous men are not, truly speaking, free men, but to "answer present exigency will submit to any terms that "the crafty may impose upon them." (Chancellor Worthington in Vernon *vs.* Bethell, 2 Eden, 113.)
>
> "The policy of this Court is not more complete in "any part of it than in its protection of mortgagors. A "man will not be suffered in conscience to fetter him- "self with a limitation or restriction of the right of re- "demption. It would ruin the distressed and unwary "and give unconscionable advantage to greedy and "designing persons." (Spurgeon *vs.* Collier, 1 Eden, 29.)
>
> "Courts of equity have strenuously resisted all at- "tempts to abridge the right of redemption, and held "even express agreements for that purpose to be wholly "void, contrary to the otherwise universal principle, "'*modus et conventio vincunt legem.*' * * * No case "can be found in which it has been determined that "the mortgagee can, by force of any agreements made "at the time of creating the mortgage, entitle himself, "at his own election, to hold the estate free from condi- "tion and cutting off the right in equity of the mort- "gagor to redeem. Such an agreement would not be "enforced as against the mortgagor." (1 Hilliard on Mortgages, pp. 69, 85.)
>
> "It is also an established doctrine that an equity of "redemption is inseparably connected with a mort- "gage. * * * This right cannot be waived or aban- "doned by any stipulation of the parties made at the "time, even if embodied in the mortgage. This is a

"doctrine from which a court of equity never deviates." (Peugh *vs.* Davis, 96 U. S., 337.)

"When it (a contract) is once determined to be a "mortgage all the consequences of account, redemption, "and the like, follow, notwithstanding any stipulation "to the contrary, for the power of redemption is not "lost by any hard condition, *nor shall it be fettered to "any point of time not according to the course of the court.*" (Pointdexter *vs.* McCannon, 1 Dev. Eq., 375.)

The parties to this mortgage could not, therefore, have made any valid contract limiting the right of redemption. Even if the mortgagor had expressly stipulated that he should be barred of his right of redemption upon default, or at the date of judgment, or the date of sale, or had wholly waived the right, or had expressly agreed that the right of redemption should be restricted in accordance with some specified statute then in force, such contract would have been void and wholly disregarded by the courts. The right cannot be "fettered to any point of time not according to the course of the court." This rule has been applied for more than a century. Is there any reason why it should be now relaxed or why the courts should guard the rights of the mortgagor less jealously? Have creditors grown less rapacious or greedy? Have debtors become in these latter days less distressed or necessitous? And shall the courts, at the instance of the modern Shylock, who insists upon his "pound of flesh," because "so nominated in the bond," now reverse its rule of construction and enforce the contracts which for a hundred years they have declared void and inoperative?

(2.) And if the parties to this mortgage could make no express contract limiting or fettering the right of redemption, there is no principle of law by which the courts will imply such contract, even though the statutes existing at the date of the mortgage contain no provision for redemption. It is

a well-established legal principle that what is directly prohibited cannot be done indirectly. The courts will never imply a contract that would be void or inoperative if made by express stipulation.

(3.) This equitable rule is made for the benefit and protection of the mortgagor, and cannot properly be invoked on behalf of the mortgagee. The contract, whether express or implied, is inoperative only so far as it attempts to *restrict* the right. Federal courts of equity, in the foreclosure of mortgages, have, in pursuance of this rule, always disregarded contracts which purport to restrict the right, and also disregarded statutes of the State which contain no provision for redemption. The usual practice in these courts, even in States which make no provision for redemption, is to allow a specific time, at least six months, to the owner to redeem, and this time may be extended once or oftener, at the discretion of the court, according to the circumstances of each particular case (Clark *vs.* Reyburn, 8 Wall., 318). Even after sale, upon payment of the debt, unless some counter equity forbade, the court would, upon equitable principles, vacate the sale and permit redemption. The justification for this practice of courts of equity is not to be found in any theory that such courts may at pleasure disregard the obligations of contracts, but in the doctrine that any contract which restricts the right of redemption has no binding force. In other words, these courts have, by their uniform practice, recognized the doctrine for which we contend, that there is no obligation in any contract which purports to restrict the right of redemption, and that the regulation of the right by the court does not impair the obligations of such contract. If the courts may thus regulate the right without being chargeable with impairing the obligations of contracts, may not the State by legislative enactment regulate the exercise of the right upon equitable principles? The statute in question does nothing more than to formally enact the equitable rule.

(4.) If the right of redemption is impliedly reserved in every mortgage, notwithstanding any language to the contrary; if this right cannot be limited by contract nor "fettered to any point of time not according to the course of the court;" if Federal courts of equity may properly grant extensions of the period of redemption, regardless of express stipulations to the contrary and disregarding any contract that might be implied from the fact that the statutes of the State had made no provision for redemption; if, in short, such contract, whether express or implied, is wholly inoperative; it is difficult to understand how any enactment of the State legislature which deals with and regulates this right upon equitable principles, in a reasonable way, can be forbidden on the ground that it impairs the "obligations of contracts."

RIGHT OF POSSESSION—RENTS AND PROFITS—RECEIVERS.

(1.) But opposing counsel claim that the new law impairs the obligations of the contract because it not only gives the owner the right of redemption, but by certain other provisions it also gives him the right of possession and the rents and profits until the right of redemption is extinguished; and in this connection counsel call attention to the stipulation in the mortgage that upon default the legal holder of the mortgage "shall be entitled to the immediate possession of the premises and of the rents and profits thereof;" also to an old statute of Kansas which provides that "in the absence of stipulations to the contrary the mortgagor of real property may retain the possession thereof;" and then counsel ask, "May not the parties stipulate that the mortgagee may take possession of the mortgaged property, as was stipulated in this case?" We answer this question by referring to the decision of the supreme court of Kansas in the case of Seckler *vs.* Delfs (25 Ks., 159), in which the opinion of that court was delivered by Mr. Justice Valentine (who

now, as counsel, thus ingenuously puts the question), in which case a similar stipulation as to possession and rents and profits had been made in the mortgage, and the court distinctly held that the mortgagee obtained no rights whatever by virtue of such stipulation (see syllabus on page 10 *ante*). We concede the right of the eminent counsel who raised this question to attack under other conditions the rule of construction which he as judge so definitely formulated and always concurred in; but we suggest that in this case and in this Court the construction placed by the State court upon such contracts must be conclusive.

(2.) The supreme court of Kansas has, by its final decision in this case, in construing the mortgage, held that the stipulations in the mortgage as to possession and rents and profits were void and nugatory at the time they were made. (See opinion of Chief Justice Martin; Record, p. 35.) We have seen that this was no new construction, but was in entire accord with all the previous decisions of that court except the first decision in this case and in the case of Watkins *vs.* Glenn, in which two cases it is apparent, from the opinion of Chief Justice Horton, that the previous construction by that court of such contracts was overlooked. In any event, the final construction by the State court must in this case, as we have seen, be conclusive in this Court, and it is hardly necessary to follow counsel in their criticism of that construction or in their repeated references to the right of possession and rents and profits as stipulated in the mortgage. It is enough to say that, so far as these stipulations in the mortgage were concerned, the contract was inoperative, and therefore without obligation.

(3.) But counsel further say that under the former law the district court might in an action to foreclose this mortgage have appointed a receiver, who might have taken the rents and profits and applied them to the payment of this

mortgage. But this could be done, not by virtue of any stipulations in the mortgage, but by virtue of the general equitable powers of the court, and under a statutory provision which permitted the appointment of receivers in actions to foreclose mortgages where the security was shown to be probably inadequate, or where the property was in danger of being lost, removed, or destroyed (Gen. Stat. Ks., 1889, sec. 4349; Seckler *vs.* Delfs, 25 Ks., 159). This provision of the statute is not expressly repealed nor amended by the new law. Its continued operation would be entirely consistent with all the provisions of the new law. The provisions of the new law as to possession and rents and profits are general, and do not necessarily conflict with or repeal the special provision of the existing law relating to the appointment of receivers where the security is inadequate or the property is in jeopardy. Under the old law, with these exceptions, the mortgagor held the absolute right of possession and the rents and profits until he was finally and forever barred of his estate by the due course of judicial procedure. The new law conveys no additional rights in this respect, but merely formulates the construction given by the courts to the old law. While the new law does not expressly re-enact these special provisions for the appointment of receivers, they would clearly be still applicable down to the date of the sale, and possibly to the date of final deed. But the question as to whether the provisions of the old law as to the appointment of receivers where the security was inadequate or the property in jeopardy were repealed or could operate after sale was not in this case, and the State court very properly did not decide the question.

(4.) Counsel further suggest that the provisions of the new law regarding the payment of interest as a condition of redemption might perhaps be so construed by the State court as to allow the owner to pay a less rate of interest than that provided in his contract. The law provides that as a

condition of redemption the owner pay "the amount sold for, together with interest, costs, and taxes," but the rate of interest is not specified. Apparently the intention of the legislature was that the rate of interest should be determined by the judgment and contract. The State court has not decided that question. It may be assumed that it will be properly decided when reached. This Court, however, has already decided that a change in the rate of interest to be paid as a condition of redemption does not impair the obligations of the contract. (See Conn. Life Ins. Co. *vs.* Cushman, 108 U. S., 51.)

(5.) In their discussion of these questions, opposing counsel appear to us to have entirely overlooked the proper limits of the inquiry in this Court. They first ask this Court to find that the State court has erred in its interpretation of mortgage contracts made in Kansas, and particularly of the contract in suit. They further insist that the State court has given a wrong construction to certain statutes of the State. Finally, they ask this Court to decide in advance of the State court that certain provisions of the statute in question are unconstitutional, although the State court has not by its decision in this case given effect to those provisions, but has expressly intimated and practically decided that they were capable of independent operation from that part of the new law to which that court has given effect. In view of the limitations of the jurisdiction of this Court and of the proper inquiry it can make in this case, to which we have already called attention, all of these questions raised in counsel's brief as to possession, rents, and profits, receivers and interest, and argued at such length, have no proper place in the consideration of this case.

STATUTE OF 1893 AFFECTS ONLY THE REMEDY.

We have seen that under the construction of the mortgage contract which obtained in Kansas at the time when this mortgage was made, and still obtains, and in view of the invalidity of any contract which the parties may have attempted to make or may be presumed to have made as to the extent of the estate thereby granted, or the right of possession, or the right to the rents and profits, or the manner of sale, or in any way restricting the right of redemption, the mortgagee obtained no contract rights as to any of these matters which are affected or impaired by the new law. We have also seen that, so far as concerns the right of redemption (which is the only question involved in this case), the Kansas doctrine is supported by the unanimous conclusions of courts of equity, and is the same as that long recognized by this Court; and that even if a contract restricting this right could be spelled out or in any way implied from the mortgage, such contract would be inoperative and without obligation.

The conclusion, therefore, cannot be evaded that the statute of 1893, so far as it regulates the right of redemption, does not impair any contract obligations. If the law is to be held unconstitutional it must be solely upon the ground that it changed the particular remedy which was provided for the enforcement of the mortgage lien at the time when the mortgage was made.

We shall hereafter examine the question as to the extent to which such remedy may be altered, but we desire first to call attention to the fact that every decision of this Court or of the State courts which are in any way against the validity of similar redemption laws have been based upon a different construction of the mortgage contract from that which has long obtained in the State of Kansas, and that the final decision of every State court, in States where the mortgage

is construed as in Kansas and in which this question has arisen, has been in favor of the validity of such legislation as applied to existing mortgages.

BRONSON VS. KINZIE; HOWARD VS. BUGBEE.

(1.) The principal case relied upon by those who claim the Kansas law to be unconstitutional is the case of Bronson *vs.* Kinzie, 1 How., 311, decided by this Court in 1843. In that case the Court was called on to consider a redemption law passed by the Illinois legislature in 1841, giving the mortgagor twelve months from the date of sale in which to redeem, and giving him meantime the possession of the mortgaged premises. The mortgage in question was an Illinois mortgage, made before the law passed, and the sale was made after its enactment. The mortgage in terms conveyed the legal title and the right of possession. By the common-law construction of the mortgage and the laws of Illinois, these stipulations in the mortgage were valid and operative. While the Court held the law unconstitutional as applied to that mortgage, the whole argument upon which this decision was reached would lead to a conclusion precisely the contrary as applied to a Kansas mortgage. A careful reading of the opinion of the Court shows that the decision was based upon the special attributes of the common-law mortgage. It was held in substance that the law acted not merely on the remedy, but on the contract itself, because it took away from the mortgagee an estate and a right of possession which were expressly given to him by the contract, and conferred upon the mortgagor an estate which he had parted with by valid contract, because it modified the contract itself and not merely the remedy. In delivering the opinion of the Court, Chief Justice Taney said:

> "If the laws of the State passed afterwards had done
> "nothing more than change the remedy on contracts of

"this description they would be liable to no constitu-
"tional objection; for, undoubtedly, a State may regu-
"late at pleasure the modes of proceedings in its courts
"in relation to past as well as future contracts. * * *
"Regulations of this description have always been con-
"sidered in every civilized community as properly be-
"longing to the remedy, to be exercised or not by every
"sovereignty, according to its own views of policy and
"humanity. * * * And although a new remedy
"may be deemed less convenient than the old one, and
"may in some degree render the recovery of debts more
"tardy and difficult, yet it will not follow that the law
"is unconstitutional. * * * According to the long-
"settled rules of law and equity in all of the States
"whose jurisprudence has been modeled upon the prin-
"ciples of the common law, the legal title to the prem-
"ises in question vested in the complainant upon the
"failure of the mortgagor to comply with the conditions
"contained in the proviso, and at law he had a right to
"sue for and recover the land itself. * * * As
"courts of equity follow the law, they acknowledge the
"legal title of the mortgagee, and never deprive him
"of his right at law until the debt is paid. * * *
"*When this mortgage was made no statute had been passed*
"*by the State of Illinois changing the rules of law or equity*
"*in relation to a contract of this kind.* None such, at
"least, have been brought to the notice of the court;
"and it must therefore be governed, and the rights of
"the parties measured, by the rules above stated. * * *
"As concerns the law of February 19, 1841, it appears
"to the court not to act merely on the remedy, but di-
"rectly upon the contract itself, and to engraft upon it
"new conditions injurious and unjust to the mortgagee.
"It declares that although the mortgaged premises
"should be sold under the decree of the court of chan-
"cery, yet that the equitable estate of the mortgagor
"shall not be extinguished, but shall continue for twelve
"months after the sale; and it moreover gives a new
"and like estate, which before had no existence, to the
"judgment creditor to continue for fifteen months.
"This law gives the mortgagor and judgment creditor
"an equitable estate in the premises, which neither of
"them would have been entitled to under the original

"contract; and these new interests are directly and ma-
"terially in conflict with those which the mortgagee
"acquired when the mortgage was made. Any such
"modification of a contract by subsequent legislation,
"against the consent of one of the parties, unquestion-
"ably impairs its obligations, and is prohibited by the
"Constitution."

In the subsequent case of Howard *vs.* Bugbee (24 How., 461) the same question came before the United States Supreme Court with reference to an Alabama mortgage executed in 1836 and a redemption law passed in 1842. The Court simply referred to its decision in the case of Bronson *vs.* Kinzie as governing that case. This decision was also based upon a mortgage made in Alabama, where the common-law theory of mortgages also prevailed, the mortgage vesting in the mortgagee the legal title and absolute right of possession after default. (See Jones on Mortgages, sec. 18; 32 Ala., 9.)

The two cases above cited are the only cases we find in which the Supreme Court of the United States has passed upon this question prior to the decision in the Conn. Life Ins. Co. *vs.* Cushman, which we shall notice hereafter, and, as we have seen, both of these decisions were based upon a common-law mortgage.

(2.) The important distinction between Kansas mortgages and Illinois mortgages is noted in the case of Waterson *vs.* Defoe (18 Ks., 223, 235), in which Mr. Justice Horton, writing the opinion of the Court, referring to Illinois mortgages, said:

"In that State, by the mortgage deed, the legal title
"passes to the mortgagee. Upon failure to perform the
"conditions the title apparently becomes absolute in
"the mortgagee, and is clearly color of title, and after
"condition broken the mortgagee, at law, may bring
"his action of ejectment and recover possession. This
"is not so in Kansas; hence, in this State, the Illinois
"authorities are not in point."

(3.) *The Kansas redemption law does not change the nature of the estate of the mortgagor, as was the case in Illinois.* The law creates no estate in the mortgagor after sale new or different in any respect from what he had before the sale, except that the judgment and sale have limited the duration of such estate unless payment is made. By the express terms of the judgment of the district court in this case, entered at the instance of the mortgagee and under which the sale was made (from which judgment plaintiff in error did not appeal and cannot now complain in this Court), the owner's estate was not barred at the time of the judgment or at the date of sale nor until the sheriff's deed should issue according to law. This estate of the mortgagor or owner carried with it under the old law, as well as under the new statute, the absolute right to the possession and the rents and profits (except where the security was insufficient or the property in jeopardy, in which case the court might appoint a receiver) until the delivery of the sheriff's deed. The new law merely postpones the time when such deed shall issue, and the estate of the mortgagor or owner shall be thereby terminated, but makes no change in its nature. Such estate, carrying with it the right of possession and rents and profits, would continue down to the time of the execution of the sheriff's deed, whether the old law or the new statute be applied to the sale.

(4.) Nor does the new law change the nature or extent of the lien of the mortgagee; it merely defers the time when such lien shall ripen into title and possessory rights, extends the time which must elapse before the foreclosure is complete, and regulates the right of redemption already inherent in the mortgage contract. The mortgagee gets all he has contracted for. When the lien which the mortgagee acquired on the property and its rents and profits is fully and finally foreclosed it is converted into title and possessory

rights just as fully and completely as before, the only change being in the time required.

(5.) The new statute, so far as it concerns the right of redemption, is in effect nothing more than a statute of limitations. It defines and limits the period within which the right of redemption already inherent in the mortgage contract may be asserted. It does this without making any change in the nature of the right or in the character of the estate. It is well settled that legislation which changes existing statutes of limitation is a legitimate alteration of the remedy and within the power of the legislature to apply to existing contracts. (Terry *vs.* Anderson, 95 U. S., 628.)

DECISIONS OF STATE COURTS ON SIMILAR REDEMPTION LAWS.

Before examining the further decisions of this Court on the general question of the constitutionality of legislation which affects the remedy we respectfully invite the attention of the Court to the decisions of the highest courts in the different States where the precise question involved in this case has arisen. In examining these decisions it is necessary to distinguish between a sale made under a mortgage containing a "power of sale," as authorized in some States, and a sale made under a decree in judicial proceedings. Where a sale is made under a power of sale contained in the mortgage it is a distinct exercise of authority under the terms of a contract authorized by law, and title is conveyed according to the form of the contract. In such cases a new law providing for redemption and possession by the mortgagee necessarily affects the contract rights of the parties and could not properly apply. While some of the State courts have recognized this exception, an examination of the authorities shows that every State court that has been called upon to determine the question (in States where the common-law theory of mortgages have been modified, as in

Kansas) has finally sustained the constitutionality of similar redemption laws as applied to existing mortgages, when foreclosed by action. It is interesting to note that while in several States early decisions may be found deciding adversely, yet in every such case such adverse decisions have been either squarely reversed or practically overruled by later decisions of the same courts.

CALIFORNIA.—The supreme court of California, in the case of Moore *vs.* Martin (38 Cal., 428), in construing a statute giving the owner eighteen months' right of redemption after sale, expressly held that "the legislature has power to provide that all judicial sales of real estate thereafter to be made, whether upon judgments then existing or upon judgments thereafter to be obtained upon contracts then existing, should be subject to redemption without violating the Federal or State constitution." The same court had previously, in the case of Thorn *vs.* San Francisco (4 Cal., 127), held by a divided court that this statute was unconstitutional as applied to existing mortgages, but in the later case of Tuolumne Redemption Co. *vs.* Sedgwick (15 Cal., 516) the same court reviewed the question and practically overruled its former decision, Mr. Justice Field, now of this Court, concurring; and in the subsequent case of Moore *vs.* Martin, cited above, such former decision was squarely reversed by a unanimous court. We respectfully ask the attention of this Court to the exhaustive opinion of Mr. Justice Heydenfeldt on this question, found in 4 Cal., page 154.

MINNESOTA.—The supreme court of Minnesota, in the case of Hayward *vs.* Judd (4 Minn., 487), was called upon to construe an act of the legislature, passed in 1860, by which the period of redemption was extended from one year to three years and the mortgagor was given the right of possession during the entire period of redemption, a right which, under the old law, he did not have at all. The court held,

after a full discussion and in a very able opinion, that the law did not affect the obligations of the contract, and that a sale made under a decree of the court upon a prior mortgage must be made under the new enactment; that the creditor must take his remedy as he finds it at the time of his application to the court; that the law did not infringe upon the contract, either as to its terms or its spirit, and that the right of the mortgagor to hold possession and the terms under which he may exercise such right of possession of redemption after sale are within the power of the legislature to grant and regulate. The same court afterwards reaffirmed this decision in numerous cases.

INDIANA.—The supreme court of Indiana, in the early case of Scobey *vs.* Gibson (17 Ind., 572), held that a similar law providing for redemption was invalid as to existing mortgages. This decision was made by a divided court, and based upon the common-law construction of the mortgage contract which then obtained in Indiana. Since then the same court has practically overruled the case of Scobey *vs.* Gibson, holding in substance that the decision in that case was based upon the common-law construction of the mortgage contract which obtained in that State at the time that decision was made, and that in view of the changes which had been made by statute as to the effect and construction of the mortgage contract (which is now construed as in Kansas) the decision in that case cannot be considered as applicable to mortgages made since the common-law construction of the mortgage contract was changed. (See Davis *vs.* Rupe, 114 Ind., 588; Robertson *vs.* Van Cleave, 129 Ind., 229; Traveller's Ins. Co. *vs.* Brouse, 83 Ind., 62.)

IOWA.—The supreme court of Iowa may be cited as another court which has overruled its earlier decisions to the contrary, and now upholds the constitutionality of similar legislation as applied to prior mortgagors. In the early case

of Maloney *vs.* Fortune (14 Ia., 418) that court held that the redemption law passed in 1860 was invalid as to prior mortgages. No argument was made in that case by counsel to the contrary, and the decision was rendered without discussion. It is well to note that at the time when the mortgage in question was made the mortgagee had under the Iowa law the right of possession after default (see White *vs.* Rittenmayer, 30 Iowa, 273), and the redemption law took away this right. But in the later cases of Holland *vs.* Dickinson (41 Ia., 367), Babcock *vs.* Guerney (42 Ia., 156), Fonda *vs.* Clark (43 Ia., 300), Olmstead *vs.* Kellogg (47 Ia., 460), the same court adopts the contrary doctrine, and in the last-named case holds that while the legislature could not enact a law requiring appraisement so as to apply to existing mortgages, it could change from an appraisement law to one authorizing a sale without appraisement and providing for redemption, and that such new law would apply to existing contracts, and the sale must be made under the new law.

TEXAS.—The supreme court of Texas, in the case of International Bldg. & Loan Ass'n *vs.* Hardy (26 S. W. Rep., 497), while holding that the legislature could not pass a law which affected the remedy provided for in a power of sale mortgage so as to take away or materially change a remedy expressly contracted for by which the mortgagee could enforce his rights without resort to the process of the courts, called attention to the distinction between a mortgage which secures to the creditor a right to a specific remedy and one which simply gives a right to a lien to be enforced through the courts, and held that if the mortgage contract had gone no further than to simply secure a lien to be enforced through the courts it would have been entirely within the power of the legislature to change the remedy then existing for the enforcement of such right through judicial procedure. "For the parties," the court said, "contract with

reference to the enforcement of such rights through the courts if this becomes necessary, and they must be understood to contract in view of the fact that the State has power to establish courts, to fix their jurisdiction, and also to regulate procedure, and that this cannot be controlled by contracts persons may make."

ALABAMA.—The Alabama supreme court, in Iverson *vs.* Shorter (9 Ala., 113), held that a statute of that State giving a right of redemption for two years after sales on executions or under mortgages was constitutional as to prior contracts, at least so far as it governed sales on executions. While this Court, in the case of Howard *vs.* Bugbee, *supra*, held that this law could not apply to mortgages made in Alabama, where the common-law theory of mortgages prevailed, the close analogy between the general lien of a judgment creditor and that of a mortgagee, under a mortgage construed as in Kansas, makes it apparent that the Alabama supreme court is in line with the other State courts which we quote in holding that where the party who has obtained a lien on real estate has not by express contract obtained a right to a specific remedy the legislature may change the mode of procedure for the enforcement of the lien by allowing the right of redemption after sale.

WISCONSIN.—The Wisconsin supreme court, in the case of The N. W. Mut. Life Ins. Co. *vs.* Neeves (46 Wis., 147), held that a law which repealed a previous law, giving one year's right of redemption after sale, and postponed foreclosure sales for one year after judgment did not impair the obligations of contracts in applying to mortgages given before its enactment. The same court, in the case of Von Baumback *vs.* Wade (9 Wis., 559), was called on to consider the constitutionality of an act of the legislature which provided that defendants in actions to foreclose mortgages which were executed prior to its passage should have six months' time

in which to answer the complaint, and that the mortgaged premises should not be sold upon the judgment except upon six months' previous notice of the time and place—practically an extension of the time for redemption of one year. The court held that the act was constitutional; that, although the statute extended the time for one year, it did not infringe upon or materially impair the obligation of the contract; that the legislature may regulate at pleasure the modes of proceedings in the courts in relation to past as well as future contracts; that it may limit or extend the time for taking any step necessary in an action in the courts to enforce such contracts, and that the only limit or qualification to this power is that the legislature must confine its action within the bounds of reason and justice, and that a reasonable and substantial remedy be left according to the course of justice.

OREGON.—The supreme court of Oregon, in the recent case of State *vs.* Sears (43 Pac. Rep., 482), considered an act of the legislature which increased the time for the redemption from forced sales of real estate from four months to one year from the confirmation of the sale, and held that it properly applied to decretal sales on mortgages executed prior to its passage, and did not impair the obligations of contracts within the meaning of the Federal Constitution. The opinion of Chief Justice Bean in that case contains an able review of the authorities, to which we respectfully ask the attention of this Court.

MONTANA.—The supreme court of Montana, in the case of State *vs.* Gilliam (decided March 16, 1896, not yet reported), held that a statute of that State passed July 1, 1895, which extended the time for redemption from six months to one year, was constitutional and properly applied to previous mortgages; that the mortgage as construed in that State was not a conveyance of the real estate, as in the case of

Bronson *vs.* Kinzie, but only a lien; that the new law did not impair the obligations of the contract, but acted only on the remedy, and that such alteration of the remedy was a proper and legitimate exercise of legislative power.

KANSAS.—While we do not deem it material in this case to inquire what the previous decisions of the Kansas supreme court may have been upon this question, in view of the final conclusions of that court, as found in its decision in this case, yet, as opposing counsel have claimed in their brief that the last decision is in conflict with early decisions of that court, we will briefly examine that question. The two early cases referred to by counsel as having decided this question are Bixby *vs.* Bailey (11 Ks., 359) and Ogden *vs.* Walters (12 Ks., 282). While in the opinion in each of these cases there is a brief incidental reference to the redemption law of 1861, and a statement that the mortgage, having been executed before that law was enacted, could not be affected by its provisions (citing Bronson *vs.* Kinzie), even a casual examination of these cases will show that the question as to whether that redemption law was constitutional if applied to existing mortgages was not properly before the court in either case; that the decision of the matters before the court did not require any decision upon that question; that both of these cases were decided upon other grounds, and that what was said by the court upon that question was mere *obiter dictum*, added incidentally and without special consideration. These cases illustrate the danger of a departure from the well-recognized rule that a court should not pass upon the constitutionality of any law unless necessarily involved in the case before the court.

The decision of the Kansas supreme court in the case of Greenwood *vs.* Butler is entirely misconstrued in the brief of opposing counsel (p. 48). In that case the court held that the rights of the parties were fixed and determined by the judgment which had been rendered before the redemption

law of 1893 took effect, and expressly refused to pass upon the constitutionality of that law as applied to existing mortgages where judgment had not already been rendered.

The three cases above cited are the only decisions of that court bearing upon the question of the proper application of redemption laws prior to the first decisions in Barnitz *vs.* Beverly and Watkins *vs.* Glenn, in May, 1895, which we shall examine hereafter. These are the decisions which the learned counsel for plaintiff in error argue "became a rule of contract, of business and property," and upon which is based their lugubrious plaint that "now all these decisions are overthrown and all this confidence destroyed," and their professed gloomy forebodings as to what next or further the court or the legislature may do. It hardly seems necessary to follow counsel in this line of argument, but we may at least assure them that the final decision of the supreme court of Kansas, so far from being a radical departure from well-established principles and precedents, is in entire accord with the unanimous conclusions of all other courts that have passed upon this question.

We have shown that the highest courts of the States of California, Minnesota, Kansas, Iowa, Wisconsin, Oregon, and Montana have determined the precise question now before this Court, and that the highest courts of Indiana, Texas, and Alabama have practically determined the same question, and that these courts have substantially agreed that the legislature may pass redemption laws similar in character to the Kansas law and make them applicable to existing mortgages when foreclosed by action in the courts; that such legislation does not affect the contract rights of the parties (in States where the common-law construction of the mortgage has been modified as in Kansas) and does not impair the obligations of the contract. No contrary decision can be found in this Court or in the court of any State where the mortgage contract is construed as in Kansas. A reversal of the decision in this case, therefore, prac-

tically means a reversal of the final decisions of the highest courts of ten different States. It means an overturning of the rules of contract and the law of property which has obtained in several of these States for more than thirty years, and which obtains in all of them at the present time. These decisions have been rendered after the most thorough discussion and careful consideration by many eminent and conscientious jurists. The reasons given have been so cogent and the decisions so universally concurred in that no appeal has heretofore been taken to this Court. They are in entire accord with the rulings of this Court as understood and interpreted by these various State courts. But the modern Shylock is aggressive; he assumes that in these latter days his rights have become paramount to those of courts or legislatures, and with apparent assurance he now not only practically asks this Court to revise its ancient and time-honored equitable rule for the protection of the right of redemption, but insists that the construction of the mortgage contract which has been adopted in at least one-third of the States be set aside, and that he now receive according to the letter of his contract. He further asks that this Court deny to the State legislature the right to longer regulate the course of judicial procedure in its courts in the foreclosure of mortgages. While the decisions of the State courts are, of course, not binding on this Court, yet the fact that they have agreed with such unanimity on this question, and that their decisions have become a law of property so widely recognized in this country, is a strong and urgent reason why this Court should not at this late day overturn them or change such law of property.

THE PLAINTIFF IN ERROR, AS PURCHASER, CANNOT RAISE THE QUESTION AS TO IMPAIRMENT OF THE MORTGAGE CONTRACT.

The rights of the plaintiff in error as *mortgagee* ceased at the time of the sale and confirmation. Those rights were settled and determined by the judgment of the district court, from which no appeal was taken. Upon the sale and confirmation the mortgagee presumptively received the proceeds of sale and collected or could have collected the balance of her debt from the judgment debtors if there was a deficiency. Thenceforth no persons but the purchaser and the owner were interested in the question of redemption or any other question raised in this case. The result of this case and the decision of this Court can be of no possible interest to the mortgagee as such. If the purchaser had been a third person, not interested in the mortgage, it would not be claimed for one moment that he could be heard in this Court to complain that the obligation of the contract with the mortgagee had been impaired. The fact that in this case the purchaser and the mortgagee are one and the same person makes no difference. In either case the rights of the purchaser are not determined by the mortgage contract, but by the laws in existence at the time of sale. This precise question was settled by this Court in the case of Conn. Life Ins. Co. *vs.* Cushman (108 U. S., 51). In that case a statute reducing the rate of interest from 10 to 8 per cent. on the amount bid, to be paid by the mortgagor as a condition of redemption from a purchaser at a decretal sale, was held valid and applicable to all sales thereafter made. The mortgagee in that case also became the purchaser at the sale. The opinion of Mr. Justice Harlan contains a clear enunciation of the law on the question as to how the rights of the purchaser in such cases

must be determined, and the entire argument bears directly upon all the questions involved in this case. He says:

> "The contention of the company's counsel is that "this act cannot be applied without impairing the ob- "ligation of its contract. What was that contract? In "what did its obligation consist? By the contract be- "tween the mortgagor and the mortgagee the former "became bound to pay within a certain time the mort- "gage debt, with the stipulated interest. * * * "Certainly the obligation of that contract was not im- "paired by the act of 1879, for it did not diminish the "duty of the mortgagor to pay what he agreed to pay "or shorten the period of payment or interfere with or "take away any remedy which the mortgagee had by "existing law for the enforcement of its contract. The "statute in force when the mortgage was executed, pre- "scribing the rate of interest which the amount paid or "bid by the purchaser should bear as between him and "the party seeking to redeem, had no relation to the ob- "ligation of the contract between the mortgagor and "the mortgagee. The mortgagor might, perhaps, have "claimed that his statutory right to redeem should not "be burdened by an increased rate of interest beyond "that prescribed by statute at the time he executed "the mortgage; but, as to the mortgagee, the ob- "ligation of the contract was fully met when it "received what the mortgage and statute in force "when the mortgage was executed entitled it to de- "mand. *The rights of the purchaser at the decretal sale, "if one was had, were not of the essence of the mortgage con- "tract, but depended wholly upon the law in force when the "sale occurred.* The company ceased to be a mortgagee "when its debt was merged in the decree or, at least, "when the sale occurred. Thenceforward its interest "in the property was as purchaser, not as mortgagee, "and to require it as purchaser to conform to the terms "for the redemption of the property as prescribed by "the statute at the time of purchase does not, in any "legal sense, impair the obligation of its contract as "mortgagee. It assumed the position of purchaser, "subject, necessarily, to the law then in force defining "the rights of purchasers. * * * When that act

"was passed there was no person to answer the descrip-
"tion or to claim the rights of a purchaser; conse-
"quently no existing rights were thereby impaired.
"That the reduction of interest to be paid to the pur-
"chaser would lessen the probable number of bidders
"at the decretal sale and thereby diminish the chances
"of the property bringing the mortgage debt are plainly
"contingencies that might never have arisen. They
"could not occur unless there was a decretal sale nor
"unless the mortgagee became the purchaser, and are
"too remote to justify the conclusion, as matter of law,
"that such legislation affected the value of the mort-
"gage contract."

This decision seems to us wholly decisive of every question in this case. Under the statement of the law there made it seems clear, not only that the obligation of the mortgage has not been impaired, but that, even assuming it was impaired as to the rights of the mortgagee, the plaintiff in error, as purchaser, cannot in this case be heard to raise the question.

THE LAW OF THE REMEDY.

The authorities are substantially agreed that, while the State cannot by legislation change or alter the contract rights of the parties, it may change the remedy for its enforcement through the courts. Tribunals may be changed, the period of limitation of actions may be shortened or extended, existing rules of evidence may be repealed, the costs of litigation may be increased, and methods of judicial procedure may be altered, so as to affect past as well as future rights of action. Such legislation is held to be invalid only when it leaves the parties without a substantial remedy. This general doctrine has been stated by eminent authorities and by the courts in varying language, but with a substantial agreement.

In Bronson *vs.* Kinzie, 1 How., 311, 316, Chief Justice Taney said:

> "Whatever pertains merely to the remedy may be "altered according to the will of the State, provided the "alteration does not impair the obligation of the con- "tract."

In Sturges *vs.* Crowninshield, 4 Wheat., 122, Chief Justice Marshall said:

> "The distinction between the obligation of a contract "and the remedy given by the State to enforce that ob- "ligation has been taken at the bar and exists in the "nature of things. Without impairing the obligation "of the contract the remedy may certainly be modified "as the wisdom of the nation shall direct."

A recent authority, generally recognized as standard, sums up the discussion as follows:

> "The remedy provided by law for the enforcement "of a contract is no part of its obligation, and whatever "pertains merely to the remedy may be changed, modi- "fied, or abrogated by the legislature and to any extent, "provided a substantive remedy be still left to the cred- "itor, and such changes may constitutionally apply to "existing contracts; but if the parties to a contract in- "clude in it in express terms the remedy to be sought "upon its breach or the means to be used for securing "its performance, subsequent legislation changing the "remedial process they have agreed upon is as to them "inoperative." (3 Am. and Eng. Cy. Law, 753.)

And in Tennessee *vs.* Sneed, 96 U. S., 74, it is said:

> "The rule seems to be that in modes of proceedings "and of forms to enforce a contract the legislature has "the control, and may enlarge, limit, or alter them, "provided it does not deny a remedy or so embarrass "it with conditions and restrictions as seriously to im- "pair the value of the right."

It has been sometimes said in the opinions of this Court that the laws subsisting in a State at the time when a contract is made, including those which affect its validity, construction, discharge, or enforcement, enter into and form a part of the contract as if they were expressly referred to or incorporated in the contract (Von Hoffman *vs.* Quincy, 4 Wall., 550; Edwards *vs.* Kearzey, 96 U. S., 595; Seibert *vs.* Lewis, 122 U. S., 284). But the expressions found in these cases must be understood in the light of the particular question to be decided, for, as was said by Chief Justice Marshall in Ogden *vs.* Saunders, 12 Wheat., 233, "the positive authority of a decision is coextensive only with the facts on which it is made." The later cases, however, distinguish between such laws as affect the construction and operation of the contract and those which affect merely the remedy, and hold that the laws in reference to which the parties must be assumed to have contracted were those which in their direct or necessary legal operation controlled or affected the construction and operation and obligations of the contract, not those which affected merely the remedy.

Conn. Life Ins. Co. *vs.* Cushman, 108 U. S., 51.
Morley *vs.* Lake Shore R. R. Co., 146 U. S., 162.
Bank *vs.* Franklin, 120 U. S., 747.
Curtis *vs.* Whitney, 13 Wall., 68.

Those who make the broad assertion that the remedy constitutes a part of the contract overlook the distinction between the different classes of remedies. There are certain remedies which may be lawfully made the subject of contract and which, if incorporated in the contract directly or by reference to existing laws, become a part of its obligation. Thus in "power of sale" mortgages in States where they are recognized as valid and operative the creditor secures a right to a specific remedy which becomes a part of the obligations of the contract and of which he cannot be deprived by subsequent legislation. So in a common-law

mortgage the mortgagee secures by his contract a right to certain specific remedies, viz., the immediate use and possession of the property and the legal title. These remedies are contractual and therefore form a part of the obligations of the contract and cannot be impaired by subsequent legislation; but remedies which rest upon some particular mode of judicial procedure are not in their nature contractual. It is well established that the procedure of the courts cannot be withdrawn from legislative regulation by contract. The process and procedure of the courts cannot be controlled by private agreement, nor can the hands of the State be tied as to the modes by which it shall administer justice by stipulations of the parties. (Conkey *vs.* Hart, 14 N. Y., 30.)

When a mortgage simply gives a lien to be enforced only by judicial procedure, the remedy, so far as it relates to the time and manner of enforcement, is not contractual. The parties cannot, by contract or by reference to existing laws, control the issue or service of process, or the time of filing pleadings, or prescribe the court in which such proceedings must be brought, or the officer who shall make the sale, nor any other step in the judicial procedure necessary for the foreclosure of the lien. Still less, as we have seen, could they control by contract the time when the right of redemption shall be barred by the court, which is the final step in the judicial procedure.

Whatever may have been the language used by different learned judges upon this subject, an examination of the decisions of this Court will disclose the fact that the doctrine that the remedy is a part of the obligation of the contract has only in fact been practically applied to such remedies as were in their nature contractual or in cases where no substantial remedy was left.

PROPER APPLICATION OF THE TEST OF IMPAIRED VALUE.

It is claimed by opposing counsel that if this law is applied to existing mortgages it would affect their value, and therefore it cannot apply.

There is nothing to justify the legal conclusion that the value is affected. The majority of holders of Kansas mortgages which contain no waiver of appraisement will probably concur in the conclusion that the value of their mortgages has been enhanced by the new law, as it repeals the old appraisement laws, which had proved expensive and frequently vexatious. The holders of other mortgages, like the one in suit, can have the property sold and realize on their security at least six months sooner than formerly. In many cases the purchaser would prefer a return of his money with interest to a deed for the land. The practical result of the new law, as every one admits, is to cause the land to sell for more at the sheriff's sale than it ordinarily did under the old law.

But even if it be conceded that the value of the mortgage contract would be somewhat affected, still we insist that the authorities establish this proposition; that the mere fact that a legislative change of remedy may indirectly lessen the value of an existing contract or to some extent prejudice the interests of the creditor is not sufficient to render the law invalid. While there are some expressions found in certain former opinions of this Court which apparently justify the application of this test, a careful reading of the cases will show that this test is only to be applied with reference to legislation where a contract right is affected, not where the legislation affects merely modes of judicial procedure. Two authorities greatly relied on by those who claim that this test of impaired value should be applied are Edwards *vs.* Kearsey, 96 U. S., 595, and Seibert *vs.* Lewis, 122 U. S., 294, in which cases it was said: "Any subsequent

law of the State which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden." It will be noticed that the test provides for an impairment of the *contract* as well as lessening of its value. It will also be noticed that the impairment must be *substantial*. But in the first of the cases the Court had held that the legislation seriously impaired the creditor's right, and that no substantial remedy was left. In the other case the Court held that the legislation took away a right given by a statutory contract and gave no equivalent. In the case of Planters' Bank *vs.* Sharp, 6 How., 301, it was said: "One of the tests that a contract has been impaired is that its value has by legislation been diminished;" but in the subsequent case of Von Hoffman *vs.* Quincy, 4 Wall., 550, Mr. Justice Swayne, after citing the words last quoted, said: "This has reference to legislation which affects the contract directly and not incidentally or only by consequence." Where the contract is not directly affected this Court has repeatedly held that the mere fact that a new remedy is less expeditious than the old one, or more expensive, or may incidentally render the contract less valuable, is not sufficient cause to declare the law unconstitutional. This doctrine was substantially affirmed in the case of Bronson *vs.* Kinzie, 1 How., 354, in which Mr. Justice Taney said:

> "Although the new remedy may be deemed less convenient than the old one or may in some degree render "the recovery of debts more tardy and difficult, yet it "will not follow that the law is unconstitutional."

And in the case of Curtis *vs.* Whitney, 13 Wall., 68, the court said:

> "Nor does every statute which affects the value of a "contract impair its obligation. It is one of the contingencies to which parties look now in making a large "class of contracts that they may be affected in many "ways by State and national legislation. For such "legislation demanded by the public good, however it

"may retroact on contracts previously made and en-
"hance the cost and difficulty of performance or diminish
"the value of such performance to the other party, there
"is no restraint in the Federal Constitution so long as
"the obligation of performance remains in full force."

The reports of this Court are replete with cases where legislative changes of the remedy which operated more or less substantially to the prejudice of the creditor have been sustained as within the legitimate power of the legislature.

In the early case of Sturgis *vs.* Crowninshield, 4 Wheat., 122, it was held that a law of the State of New York which relieved a debtor from imprisonment for debt did not impair the obligation of previous contracts.

In Curtis *vs.* Whitney, 13 Wall., 68, a statute of the State of Wisconsin which provided for three months' notice to be given by the purchaser at a tax sale to the owner before deed could issue (practically extending the period of redemption for three months) was held valid and applied to previous tax sales.

In Antoni *vs.* Greenhow, 107 U. S., 769, this Court held that an act of the legislature of Virginia which provided that no costs should be allowed in any suit brought for the enforcement of a particular class of contracts and taking away the right to enforce such contract by mandamus, and imposing various other restrictions and burdens on the creditors of the State, was valid and applied to existing contracts, this Court saying that the legislature was primarily the judge of the reasonableness of the law, and the Court must presume that the change in the remedy was justified and had nothing to do with the motives of the legislature.

In Terry *vs.* Anderson, 95 U. S., 628, it was held that an enactment reducing the time within which an action must be commenced was not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar should take effect.

In Louisiana *vs.* New Orleans, 102 U. S., 203, an act of the

Louisiana legislature which took away from the judgment creditors of the city of New Orleans the right to enforce the collection of their debts by mandamus or other summary process and which applied to former contracts was held to be valid and constitutional.

In Bank *vs.* Franklin, 120 U. S., 747, an act of the legislature, passed after the debt was created, which changed the remedy from a right of summary process and attachment against the property of stockholders of a corporation to one which limited the creditor to a bill in equity or to an action at law after having first obtained judgment against the corporation and exhausted its property, was held to be constitutional.

In Conn. Life Ins. Co. *vs.* Cushman, 108 U. S., 51, this Court held that a statute which changed the rate of interest from 10 to 8 per cent. which the mortgagor must pay to be entitled to redeem did not impair the obligations of the contract. The Court also held that the contingency suggested—that the land would bring less at the sale—was too remote to be considered by the Court, and that, even if the value were indirectly impaired, this was not sufficient to render the legislation unconstitutional so long as the contract was not affected, but merely the remedy.

In Morley *vs.* Lake Shore, &c., R'y Co., 146 U. S., 162, this Court held that a statute of New York which changed the rate of interest from 7 to 6 per cent. applied to judgments already rendered. The decision is based on the ground that a judgment is not a contract, and that in the absence of a contract for the rate of interest the legislature might change the rate of interest on judgments. This case seems to settle the doctrine for this Court that where the rights of the parties are not contractual, but merely rest upon some statutory provision existing at the time a contract is made or judgment rendered, such rights may be modified or the remedy thereon may be changed without in

any way violating the provision of the Constitution as to the impairment of the obligations of a contract.

In all the cases above cited the modifications of the remedy made by the legislature have been prejudicial to the creditor and indirectly affected and lessened the value of his contract; but such changes have been uniformly upheld by this Court except in cases where the remedy was contractual, or where the legislation left no substantial remedy. We close this part of the argument with the words of Chief Justice Martin in his opinion in this case:

> "If a State legislature may totally abolish imprison-
> "ment of the debtor as a means of enforcing payment;
> "if it may shorten the statutes of limitation; if it
> "may reasonably extend and enlarge exemptions
> "of property from sale for the payment of debts; if,
> "where coupons are by law made receivable in pay-
> "ment of taxes, it may require such payment to be
> "made in the first instance in cash, to be afterwards
> "refunded and the coupons taken up; if it may reduce
> "the rate of interest on redemption from decretal sales;
> "if it may lessen the rate of interest on former judg-
> "ments; if it may require the holder of a tax-sale cer-
> "tificate to give three months' notice of the time when
> "a tax deed will be applied for; if it may require
> "transcripts of judgments against a particular city to
> "be filed in a certain office as a prerequisite to payment
> "and divest the court of the right to grant remedies in
> "force when the judgments were rendered; if it may
> "reduce the terms of court in number and duration; if
> "it may amend the law as to attachments, garnish-
> "ments, and receivers so as to take away causes there-
> "for which before were sufficient; if, in short, it may
> "regulate at pleasure the modes of proceeding in its
> "courts, and all this as to existing obligations, it is dif-
> "ficult to frame a process of reasoning which would for-
> "bid it from so regulating the procedure upon the fore-
> "closure of mortgages as to define and make more
> "certain the indefinite estate impliedly reserved by
> "every mortgagor of real property."

DECISION IN WATKINS VS. GLENN CONSIDERED.

It remains for us to notice briefly the first decision of the Kansas supreme court upon this question in the case of Watkins *vs.* Glenn (55 Ks., 417), in which it was held by a divided court that the statute of 1893 could not constitutionally apply to previous mortgages. We are betraying no confidences, but simply give a bit of the inside history of that case, when we say that counsel on both sides were attorneys for mortgage companies and equally interested in having the law declared unconstitutional, and that no brief was filed or argument made in that case for the mortgagor. We have great respect for the judicial learning and ability of ex-Chief Justice Horton, who wrote the opinion in that case, but an examination of that opinion shows that it was based on serious and fundamental errors:

(1.) The learned judge recited in his opinion the stipulation in the mortgage as to possession and rents and profits, and, overlooking the previous construction of that court by which such stipulation was absolutely void and inoperative, assumed that the mortgagee thereby obtained a contract right which was impaired by the new law.

(2.) In referring to the 24th section of the act, it was assumed that this section deprived the mortgagee of the right to have a receiver appointed, and thereby impaired the implied obligations of the mortgage; but the fact was overlooked that the prior law was not repealed; that it still operated at least down to the time of the sale as before; that the provisions relating to redemption were capable of operation wholly independent of said section 24, and were not invalidated by reason of that section. The question as to the appointment of a receiver was not properly in the case.

(3.) In applying the test of constitutionality the learned judge assumed that if the act lessened the value of the mortgage *in any degree whatever* it could not operate upon an existing contract—failing to distinguish, as this Court has uniformly done in applying this test, between a law which acts directly upon the contract and one which in making a legitimate alteration of the remedy might incidentally affect, or even somewhat lessen, the value of the contract and still not impair its obligations.

(4.) In applying the doctrine found in certain decisions of this Court to the effect that the remedy provided at the time a contract is made is a part of its obligation, there was a total failure to distinguish between such remedies as are in their nature contractual, and those which, resting in judicial procedure, are not properly the subject of contract and cannot be controlled by agreement of the parties.

(5.) The doctrine so clearly laid down by this Court in the case of Conn. Life Ins. Co. *vs.* Cushman, that the rights of the purchaser at the decretal sale must be determined by the laws in force at the time of the sale, and not by the terms of the mortgage, was wholly overlooked or ignored.

The first decision of the Kansas supreme court in this case simply followed the decision in Watkins *vs.* Glenn; but, believing that decision, based on what seemed to us such serious and fundamental errors, to be wrong, we filed our motion for rehearing, and that court, after mature deliberation and the most careful consideration, overruled its previous decision.

FILED
APR 13
JAMES H. McKE

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

October Term, 1895.

MARTHA BARNITZ,
Plaintiff in Error,
vs.
JOHN L. BEVERLY,
Defendant in Error.

No. 863.

Argument and Brief for Defendant in Error.

WILLIAM J. SCOTT,
Attorney for Defendant in Error.

(16153.)

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STATEMENT OF THE CASE.

The statement in plaintiff in error's brief states the case fairly and we will only make a brief statement of the facts necessary for the purposes of this argument.

Prior to March, 1893, and at the time the note and mortgage in this case were executed, the remedy upon default in the payment of the note secured by the mortgage, was a suit on the note against the makers or endorsers, or such a suit

combined with an action to foreclose the mortgage securing the note, which latter suit could be brought in one proceeding. In such case the court gave a personal judgment against the parties liable on the note and provided that if the judgment was not paid within six months (which period was allowed the debtor to redeem) then that the property should be sold by the sheriff and the debtor's equity of redemption should be barred and the sheriff should make a deed to the purchaser.

The note and mortgage were at the date of the judgment delivered to the clerk of the court and cancelled, and at such time became merged in the judgment. After the sale the proceeds were credited on the judgment to the amount thereof and the surplus, if any, paid to the defendant.

If appraisement was not waived then the sale could not be made unless the property brought two-thirds of its appraised value.

By the act of 1893, now in controversy, the law providing for appraisement was repealed, as was the provision for six months redemption after judgment and before sale, and the new act provides for a sale immediately after the judgment and gives the debtor, if he was not in possession of the property in good faith, six months after the sale to redeem the same from the purchaser, and if he was in possession in good faith he is given eighteen months to redeem, upon the payment of the amount the property sold for, together with interest, costs and taxes.

During the period of redemption the debtor is allowed to retain the possession of the property,

except there is waste or destruction of the premises, in which case the purchaser is authorized to go into court and on proper showing have an injunction issued in the original proceeding, or have a receiver appointed and placed in charge until the expiration of the period of redemption, who shall be entitled to rent, control and manage the property.

Under the laws of Kansas relating to the construction and effect of the mortgage contract since long prior to the date of this mortgage, the mortgagee took no title to the property nor to the rents and profits, either before or after default; his mortgage created only a lien upon the property which could be enforced only by an ordinary action and a sale under the order and judgment of the district court.

And this is true *no matter what the form of the mortgage may be* or what stipulation may be made therein as to the delivery of possession or of the rents and profits, or as to the appointment of a receiver or the waiver of the right to redeem.

All such provisions are without force or effect until he obtains possession of the property under and by virtue of the order and judgment of the court.

The question now before this court is, under this construction of the mortgage contract does the foregoing changes in the remedy, formerly provided by the state to assist the creditor in the collection of his debt, impair the obligation of the contract which the debtor made with the creditor to pay him the sum stipulated in his note and to se-

cure the payment thereof by a lien upon the property in controversy, and thus come within the inhibition of Article 1, Section 10, of the Federal Constitution, which ordains that "no state shall * * pass any * * law impairing the obligation of contracts."

A majority of the Supreme Court of Kansas, on the first submission of this case on brief without oral argument on behalf of the law, held it unconstitutional. Upon a motion for rehearing and submission of the same on brief and oral argument, the majority of the same court, there being in the meantime a change in the chief justice, held the law constitutional as applied to pre-existing contracts.

We think that there can be no question that the decision of the majority of the Supreme Court of Kansas on rehearing, overruling the judgment of the former majority of that court, is a correct exposition of the law, and the Supreme Court of Kansas has made no error in its judgment.

See opinion, page 27 of Record, 55 Kansas 466.

ARGUMENT.

REPLY TO POINTS MADE BY PLAINTIFF IN ERROR.

The gentlemen's whole argument is based upon four assumptions, which are all equally erroneous.

1. That the remedy is the obligation of the contract.

2. That the remedy provided by law for the enforcement of a contract enters into it and becomes a part of it.

3. That at the time a contract is made the creditor immediately has a vested right in the exact remedy then provided for the enforcement of that class of contracts.

4. When a mortgage is made, that it conveys the entire estate of the mortgagor, including the possession, rents, profits and the equity of redemption, and, therefore, any law providing a fixed period for redemption takes from the creditor a right acquired by the terms of his mortgage. (Page 11, their brief.)

1. The error of the first assumption will be apparent if we will consider what is the meaning of the word obligation. The obligation of a man's contract is the terms of his contract, that which he promises therein to do for another. The coercive

arm of the state or national government, that compels a man to perform his contract according to its obligation, cannot, itself, be the obligation of his contract. When men were imprisoned for debt the imprisonment was not the obligation of their contract; no more can it be said when the state takes from one his property by execution and converts it into cash, and with that cash pays the creditor, that the execution and sale are the obligation of his contract. "Should a state abolish its courts and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation of contracts? Certainly not. If the debtor passed the line into another state, the remedy there given would be immediately applied and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation, for passing the line cannot re-create an obligation which was extinguished. It must be the original obligation founded on the agreement of the parties which existed unimpaired, though the remedy was withdrawn."

Let us illustrate this, suppose a contract for the delivery of specific personal property is made in Kansas to be performed in Illinois, and at the time it matured the obligor had removed to New York, where suit must be brought; at the time the contract was made the laws of New York provided that replevin might be brought when the plaintiff was entitled to the possession, but subsequently and before suit, the laws are changed so that plaintiff must be the legal owner and entitled to possession. In such case, which laws pertaining to the remedy

would the gentlemen say were the obligation of the contract? Those of Kansas, Illinois, New York as originally, or as amended? If they are correct in their assumption, who, under such circumstances, could define the obligation of the contract?

2. The remedy provided by law, to compel the debtor to perform *his obligation*, does not enter into the contract and become the obligation of it.

The statement of this proposition ought to, of itself, dispose of the second assumption. However, so much has been said, in the opinions of many learned and able judges on this question, and some expressions in the opinions of two very able contemporary jurists, might lead some to the conclusion that the cases involving this question were not in entire harmony, that we think a brief consideration of the circumstances of the cases, in which these expressions were made, will prove that there is in reality no sort of conflict.

For review of these cases see *post* pages 32, 55, 60, 61, 65, 67, 68, this brief.

3. There are no vested rights in what are known to the law as remedies.

In *Bank of Hamilton vs. Dudley*, 2 Peters, 492, proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced before the repeal of the act of the legislature of Ohio, entitled "A law for the settlement of intestates' estates." The administrators, notwithstanding the repeal, went on to sell the land and appropriate the proceeds to the discharge of the

debts of the intestate. Held that the sale was void.

Chief Justice Marshall delivered the opinion of the court, saying, "The order of the court is a pre-requisite, indispensable to the very existence of the power (to sell) and if the law which authorized the court to make the order (which it did) be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate; it is the exercise of the legislative power which every legislature possesses."

"The mode of subjecting the property of a debtor to the demands of a creditor, must always depend upon the wisdom of the legislature."

If the contention of the gentlemen was correct, then, though a default might not occur in the contract for fifty years, yet, in the meantime, the legislature would be powerless to repeal or change the laws pertaining to the remedy provided for a breach of that class of contracts, and if, perchance, it had forgotten that such a contract was in existence; and repealed, or attempted to repeal them, yet when the courts are asked to enforce such contract, they must first discover what particular remedy was in force at the date of the contract and revivify and give effect to this law which was repealed years before.

4. Originally, when a mortgage was made it conveyed the entire estate of the mortgagor, but the growth of civilization and refinement has gradually worn many of the harsh corners off this contract. At one time the mortgagee could sell the property

and purchase it himself, without the interposition of the courts; afterward that course could only be pursued when he sold to third parties, and at that time, if he wished to purchase himself, in order to cut out the new title vested in the mortgagor, he must go into a court of equity and obtain leave of the chancellor to foreclose this equity of redemption.

Thus this estate gradually grew, and at length was recognized by nearly all civilized nations. Mr. Justice Swayne, in an able opinion, in *Clark vs. Reyburn*, 8 Wall., 318, in defining this estate says, page 321 and 322:

"The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable and alienable like other interests in real property. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim 'once a mortgage, always a mortgage,' but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterward, is held to be oppressive, contrary to public policy and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine

seems to have been borrowed from the civil law. After the practice grew up of applying to the chancellor to foreclose the right to redeem, upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specific time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute." See also pages 323 and 324.

So we see that the mortgage does not convey all the title of the mortgagor, as it does not convey away his equity of redemption, and in the State of Kansas, as in many other states, it does not convey the right of possession or to the rents and profits, and the mortgagee cannot get any of these things, no matter what the form of his mortgage may be, until he gets them by the judgment and order of a court of competent jurisdiction, and this for the reason that the law, as to the construction and effect of the mortgage contract, has been changed by legislation as shown by the rulings of the courts of these states upon such legislation.

As to the construction of the mortgage contract in Kansas, see the language of Chief Justice Martin in this case, page 35, printed record, where he says: "It may be stipulated in the mortgage that upon default of payment of principal or interest, the mortgagee shall be entitled to the possession of the mortgaged premises; it is vain; it may be solemnly agreed that in such case the rents and profits

shall be applied toward the satisfaction of the debt and interest. It is as nothing; it may be provided that for any particular delinquency a receiver may be appointed. It is a waste of words. The mortgagor may even be driven by his necessities to bargain away in the mortgage his equity of redemption; equity will treat it as void." This has been the law in Kansas for many years prior to the execution of the mortgage in question in this case, and this is our answer to the gentlemen's question in reference to Section 1, of the Mortgage Act, which section does not pretend to change the rule laid down by the courts or say that when such stipulations are made in the contract, the mortgagee may take possession. The Supreme Court of Kansas has construed it and held that the mortgagee had no such rights (see pages 27–31 this brief), and we are perfectly satisfied with Mr. Justice Valentine's construction of this section in *Seckler vs. Delf*, 25 Kansas, on page 165.

That this is so, has been repeatedly declared by the Supreme Court of that state, and in numerous opinions written by Chief Justice Horton and Mr. Justice Valentine, the able senior counsel now on the other side of this case, but even though it had only been announciated in this case, it is the law of Kansas as far as this Court is concerned, until the Supreme Court of Kansas reverses itself, or the legislature in the exercise of its discretion changes the rule. It is therefore idle for the gentlemen to say that we are attempting to belittle the Kansas mortgage. Many other states construe the mortgage contract in the same way.

In the case of *Thompson vs. Shirley*, 69 Federal Reporter, 484, the United States Circuit Court of Appeals, for the Ninth District, held that "a mortgagee has no right to take the rents, profits and crops before he has secured possession by foreclosure and sale, and the parties cannot, by a provision in the mortgage, that a receiver may be appointed in foreclosure proceedings to take the rents, profits and crops and apply them on the debt, confer such right on the mortgagee." But opposing counsel say, "the mortgage might include a lease giving to the mortgagee, as lessee, the possession." Could the wording in a lease be stronger than a deed? And yet it is always held that a deed absolute, when given as security, operates only as a mortgage. In *Steele vs. Bond*, 28 Minn. 267, it was said: "Where the relation was that of mortgagor and mortgagee, even though there is a lease, action for possession will not lie."

Therefore, under the laws of Kansas it cannot be that the mortgagee, by the act of 1893, is deprived of any right secured by the terms of his contract.

The act of 1893 in controversy in no way impairs the obligation of the mortgage contract. The mortgagor is not given *by the act* the possession or rents and profits *until after the sale*. The mortgagee by the terms of the mortgage is not given them after the sale. There is nothing in the act changing the rights of the mortgagee between the time of default and sale, nor is the mortgagor given any additional rights. The mortgagee has all the rights he formerly could enforce under the

terms of the mortgage,or even by the provisions of Section 4349, laws of 1889.

Opposing counsel say the new act changes the rate of interest. The act provides the rate of interest to be paid from the day of sale to the date of redemption as between the mortgagor and the purchaser,and thus has no relation to the mortgage contract.

This reference to interest call to mind one of the outrageous provisions of this mortgage contract and illustrates the wisdom of the courts and the legislature in protecting the debtor from unconscionable contracts which would ruin the distressed and unwary "for necessitous men are not truly speaking free men." It provides on default of any of the covenants in the mortgage that the mortgagor shall pay interest at 12 per cent per annum (not from the date of default) but from the date of the note to the time when the money shall be actually paid. See page 9 printed record.

Again counsel on page 12 of their brief say there are three cases in which we admit the statute does not apply to pre-existing mortgages:

1. "Where the sale took place and was confirmed before the act took effect." There can be no question about this, for the law by its terms specifically provides that it applies and takes effect only after the sale, and for this reason,if no other,could not be held to impair the obligation of the contract between the mortgagor and the mortgagee. It simply regulates and defines the relations between the mortgagor

and the purchaser, and in that respect comes within the rule laid down by Mr. Justice Harlan in the case of *Conn. Mutual Life Ins. Co. vs. Cushman*, 108 U. S. page 51.

2. "Where the sale alone took place before that time." We concede this, where the judgment is in the usual form of the Kansas judgment, as will be more fully shown in our remarks on admission No. 3.

3. "Where only the judgment was rendered before that time and the sale was made at a subsequent time." This is true for the reason that the decree of foreclosure in the courts of Kansas provide how the sale shall be made, and provides that upon such sale "the defendant shall be forever barred of all right and equity of redemption in and to the property described," etc., this being the very terms of a final decree unappealed from, it must be executed according to its terms. There is no appeal from the courts to the legislature.

See *Mills vs. Ralston*, *post*, page 15.

This peculiarity of the Kansas judgment fully explains the language of Mr. Justice Allen in *Greenwood vs. Butler*, 52 Kas. 424, cited page 16 and 48 of the gentlemen's brief, where counsel contended that the differences being slight the sale ought to be had under the new law. The court there said the sale would not be the same as pro-

vided by the *decree*. "It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half."

And not a word is said or intimated by the court that would sustain the position assumed by counsel, that the court in that case imagined this law in any manner impaired the obligation of a contract,and Mr. Justice Allen's able and conclusive dissenting opinion in the first decision of the Supreme Court of Kansas in *Watkins vs. Glenn*,55 Kansas, 435 (the companion case), is conclusive that the court had no such idea when he wrote the opinion in *Greenwood vs. Butler*, *supra*. See language Mr. Justice Brewer in *Mills vs. Ralston*, 10 Kansas, 212.

In reply to counsel's argument that the courts of Kansas do not possess the equitable powers we claim, it is only necessary to quote Mr. Justice Valentine in *Deering vs. Boyle*, 8 Kansas, 527, as follows:

"In this state all distinctions between actions at law and suits in equity, and the forms of such actions and suits are abolished, and in their place we have but one form of action, called a civil action.

Both common law and equity jurisdictions are vested in and administered by the same court; and whenever the rules of common law and those of equity differ, as they probably do as applied to the note now in controversy, equity being the stronger jurisdiction, the courts of this state must follow the rules of equity.

In quoting *Morley vs. Lake Shore R. R.*, page 57, their brief, counsel in support of their position italicize "*no interest had been stipulated for. There was no contract for interest.*" No doubt their position here is correct, as this is the language of this Court in that case, which, however, proves their error when they say "the remedy enters into the contract," for the law in force at the time that contract was made provided it should bear interest after maturity, and it was because "there was no contract for interest" that Mr. Justice Shiras in delivering the opinion said that act was constitutional.

KANSAS QUOTATIONS RELIED ON BY OPPOSING COUNSEL.

The opposing counsel quote *Getto vs. Friend*, 46 Kans., 24, where the court held that the contract providing the rate of interest, the legislature could not change the rate named in the contract. *Bixby vs. Bailey*, 11 Kansas, 359, in which a suit in ejectment was brought six years after final judgment, barring redemption, was entered and sale thereunder made and confirmed, in which collateral proceeding the question of the redemption law could not possibly be raised, and the language quoted by them therefrom is "*obiter dictum.*" *Ogden vs. Walters*, 12 Kans., 282, in which the facts involved are substantially the same. *Deering vs. Boyle*, 8 Kansas, 532, in which the able senior counsel on the other side, delivering the opinion, said, "States may pass

retrospective laws, however unjust; may pass acts of a judicial nature, however clearly overstepping the line of legislative power; they may pass acts divesting vested rights; they may violate express provisions of their own constitutions. Acts of these classes, however objectionable, are not within the scope of the restrictions of the Federal Constitution," and again, "It is only when states pass laws *affecting the contract itself* that such laws come within the said Federal restriction." (Italics ours.)

Greenwood vs. Butler, referred to pages 14 and 15, this brief.

Pounds vs. Rodgers, 52 Kans., 558, where it was held that "all matters relating to the sale and conveyance of land for taxes must be fully completed according to the laws under which they originated, the same as if such laws remained in force." Opposing counsel forgot to say, that under ¶ 7010, R. S. Kansas, 1889, in force at the time of sale in this case, it was provided exactly as in the quotation, *supra*.

Watkins vs. Glenn, 55 Kansas, 417, in which the dissenting opinion by Mr. Justice Allen is so clearly the law "that he who runs may read."

UNITED STATES SUPREME COURT—QUOTATIONS RELIED ON BY OPPOSING COUNSEL.

The quotations from *Bronson vs. Kinzie* and *McCracken vs. Hayward*, pages 50 to 54 of opposing counsel's brief, sustain our position beyond

question, and if they could recognize the distinction between the laws which apply to the construction and effect of contracts and those laws which regulate the proceedings in the courts, which is so clearly drawn in the cases from which they quote, they would readily see the error of their contention.

This distinction is self-evident if their quotations are read in connection with the quotations we have made from the same cases at the following pages of this brief.

Their quotation from *Gantley vs. Ewing*, is made clear on page 61, this brief.

And *Planters Bank vs. Sharp*, page 73; *Green vs. Biddle*, page 50; *Louisiana vs. New Orleans*, page 70.

Quotation from 3 Am. and Eng. Encp. of Law is shown to relate to the common law mortgage, where the redemption law changed the terms of the contract, and is fully explained by the quotation from the same work on page 32 of this brief.

From Cooley Constitutional Limitations, page 82, this brief.

From *McCracken vs. Hayward*, page 60.

From *U. S. vs. Quincy*, page 65, 69, 81.

But opposing counsel say, we argue that a contract never includes any of the laws of the state or country where made. They are mistaken, we have not, neither has the court below stated such a proposition; the court distinctly says the *lex loci contractus* governs, and there can be no doubt that those laws of a state, which apply to the

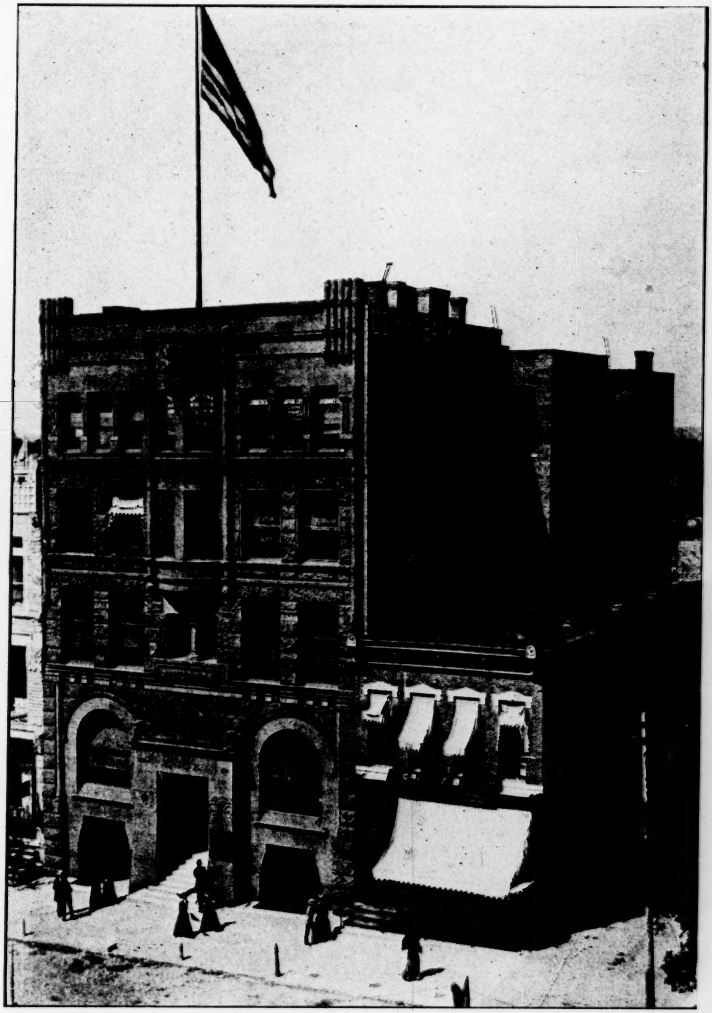
construction and effect of a contract, might be said to enter into contracts and become a part of them. But there is a wide distinction between such laws, and those which act upon contracts after they are broken, or equally upon any other injury to the person or property and compel the performance of the broken contract, or compensation for the injury, and which are known as the *lex fori*.

These last, we insist, do not enter into the contract and become a part of it, and we think this Court has uniformly so held since its organization to the present date, as shown on pages 31 to 84, this brief.

ILLUSTRATIONS--AGAINST ACT.

Opposing counsel have gone outside the record to illustrate the hardship of this law upon the creditor, and stated a case which we are informed does not exist as stated, (page 23, their brief) and this only illustrates the wisdom of courts in rendering judgment, excluding all such matters from their consideration, and otherwise discountenancing this practice. We have learned the facts of this case to be that the building mentioned is known as the "Knox Building," a magnificent brown granite building occupied by Banks and the Board of Trade, in the center of the best business district of the City of Topeka, a cut of which is shown at page 20 of this brief. In the construction of this building one hundred and ten thousand dollars actual cash was paid out, and the ground was estimated at forty

thousand dollars, the building company was capitalized at $150,000, and the stock sold as an investment all over the East. After all this had been done it was found necessary, either for further improvements or some other reason which we failed to learn, to issue bonds, secured by mortgage, on the building and grounds to the amount of seventy thousand dollars; of these bonds only forty-six thousand dollars were ever sold, and these, we understand, are now held by a majority of the stockholders who are using them for the purpose of what is generally known as freezing out the minority stockholders who are scattered all over the New England states. We were informed, in reply to our inquiry, by the person in charge of the building that this foreclosure suit was simply a friendly suit agreed upon between the bondholders and the majority stockholders, and that they had sued on the entire issue of bonds instead of upon the bonds actually sold, the more readily to cut out these minority stockholders, and that Messrs Ferry and Doran, the gentlemen on the other side, were the attorneys for the bondholders; this case may be one to excite the sympathy of opposing counsel, but it will probably not have that effect upon this Court, and especially if we consider that even were they correct in their statement of the case, a creditor who was able to take a property paying nearly twenty per centum gross on the amount of his debt, even in these times of depression, would not be a subject for commiseration, and especially when we consider that under the construction of the laws of Kansas contended



THE KNOX BUILDING COMPANY,

TOPEKA, KANSAS.

Capital $150,000. **1,500 Shares at $100 Each.**

For particulars address Wm. C. Knox, Room 12, Knox Building, Topeka, Kansas.

(ORIGINAL IN HANDS OF THE MARSHAL.)

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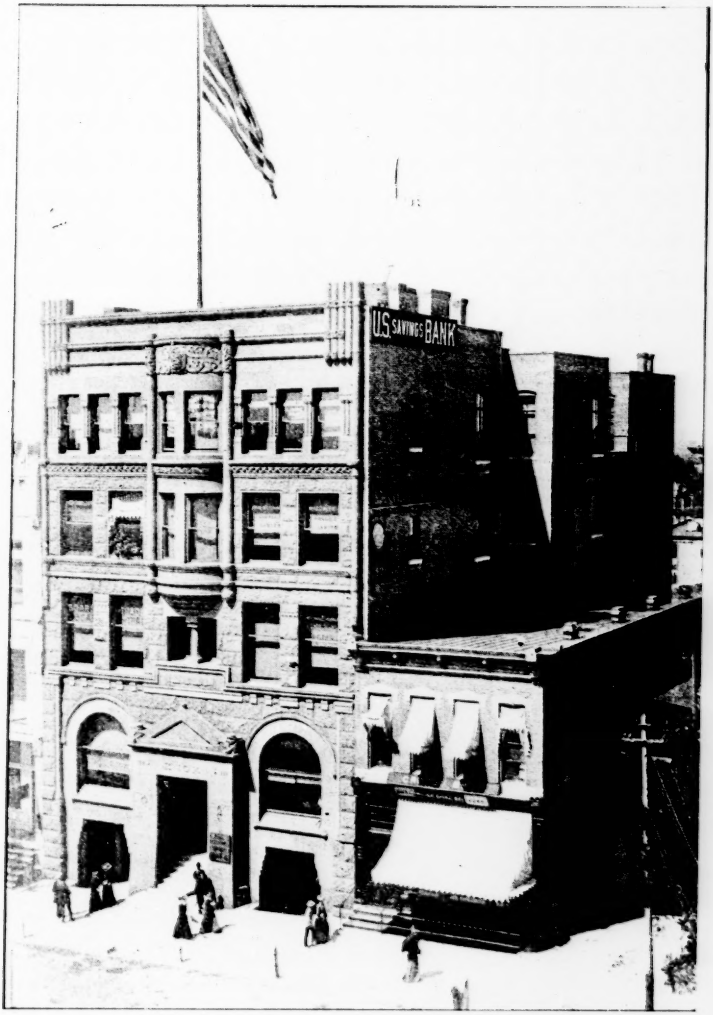

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ORIGINAL IN HANDS OF THE MARSHAL.

The Knox Building Company,

BUILDING COMMENCED MARCH 15, 1888. **TOPEKA, KANSAS.** BUILDING COMPLETED APRIL 1, 1889.

Capital $150,000, *1500 Shares at $100 Each.*

THIS property is located in the *Business Center* of the city, and is the finest and most substantial *Office Building* in the State, (see photo on opposite side.) Fireproof, Steam Heat, Gas and Electric Light, Elevator Service, Cutler Mailing System, Seventeen Fireproof Vaults, and all modern improvements.

The building is well tenanted and will pay *seven* per cent. interest on the investment, above taxes, insurance and all other incidental expenses.

$100,000.00 of Stock is offered to the public at par, ($100.00 per share.) For further particulars, address:

WM. C. KNOX.

Room 12. Knox Building. TOPEKA. KANSAS.

for, he may buy it in at the sale for a moiety of his debt and compel the stockholders to pay the balance of his judgment, for we all know that while in theory property at sheriff's sales is supposed to bring near its value; we know in practice that rarely anyone but the creditor bids at these sales, and then he bids the lowest possible sum, holding his judgment over the debtor for the balance, the result being a nation of bankrupts, without ambition or hope of relief from this impending burden.

ILLUSTRATIONS—BENEFITS OF ACT.

As the gentlemen have led the way, and as a penalty for their doing so, we ask the indulgence of the Court to state an actual case which came under our notice illustrating the wisdom of the legislature in passing this Redemption Law.

Nicholas McAlpine, one of Wyandotte county, Kansas', most progressive citizens, a man who eight years ago was considered worth three-quarters of a million, who has had real estate worth over a million sold under foreclosure, and which at such sales did not bring fifty thousand dollars, leaving him practically without a dollar and with judgments of over two hundred thousand dollars hanging over him, to blunt the edge of his ambition, bought from one Dr. Mather a piece of property for thirteen thousand five hundred dollars, paying twelve thousand dollars cash and giving note and mortgage for the fifteen hundred dollars balance; being unable to pay the note when due, the good doctor foreclosed, and at the sale bought the prop-

erty for fifty dollars, holding a deficiency judgment over McAlpine of about sixteen hundred dollars; after taking his twelve thousand cash and getting the land back which he sold him. Under the provisions of the new act, the creditor will bid the land up to its value, as the debtor may redeem by paying the amount bid, with interest and taxes. Were not the legislature wise in giving six to eighteen months to redeem in these times of depression?

In another case that came under our notice the debtor borrowed fifteen thousand dollars on seven hundred and twenty-six acres of land, which we had the affidavits of several bankers and five real estate men as being worth from fifty-five to sixty-five thousand dollars at the time of the foreclosure sale. When an installment of interest became due, which the debtor was unable to meet, he assigned as additional security two policies of insurance on his life for ten thousand dollars each, on which he had been paying premiums for more than ten years, and in the assignment it was provided that on default of the payment of any premium or on default of payment of any installment of interest or the taxes upon the property, then that the creditor, who was the Insurance Company, might cancel said insurance at its then cash surrender value, according to the rules of the company then in force, and apply the proceeds on any balance due on the mortgage debt. The creditor brought suit to foreclose the mortgage and took judgment for $19,369.70, advertised and sold the property for $15,641.19 and then proceeded to can-

cel the insurance at $3,728.51. After the sale, the debtor's mental condition being such that he had paid no attention to the proceedings so far, we were employed by his family to see if nothing could be saved from the wreck. On examination of the proceedings we discovered, that the creditor in its hurry had given a few hours too short notice in its advertisement of sale. We filed exceptions to the master's report of sale on this ground, which the court overruled. We then took the case on appeal to the United States Circuit Court of Appeals, and on a hearing there succeeded in reversing the order confirming the sale. This resulted in a delay of about twelve months before a new sale could be had, and in the meantime an offer was made of sixteen thousand dollars for two hundred acres, which, though not accepted, would have nearly paid the debt and left the debtor with five hundred and twenty-six acres of land and his twenty thousand dollars insurance intact, which at that time was liable to be earned any day. Other satisfactory arrangements were however made by which the insurance company were paid their debt. We think this case fully illustrates why the states should exercise the right here claimed, according to their own views of policy and humanity, which right must reside in every state to enable it to secure its citizens from unjust and harassing litigation. "If from sudden and unlooked for reverses, misfortune or other cause, the existing remedies become so stringent in all or a particular class of actions that great and extensive sacrifices of property will ensue without benefit to the creditor or relief to the

debtor, a relaxation of the remedies becomes a positive duty which the state owes to its citizens.

Von Baumback vs. Bade, 9 Wis. 559.

NECESSITY FOR THE ACT.

While we believe in the inviolability of contracts and though the pound of flesh nominated in the bond must go, we do not think the blood should go with it, nor do we believe all the virtues are on the side of the creditor and all the baseness and dishonesty with the debtor. It must be remembered when most of these mortgage loans were made, dollars were much cheaper than they are to-day; a bushel of corn or wheat would buy many more of them. The property on which the loans were made was also worth more in the estimation of both debtor and creditor. Have these changes been caused by the fault or mistake of the debtor, or creditor? The debtor had no purse strings to draw and thus make a scarcity of and increase in the value of dollars. While the individual creditor may not be responsible for this, his class certainly are, as it is well known that there is as much money in their hands to-day as there has been at any time in the last ten years. When loans of this description are made, the creditor generally lends about forty per centum of what both he and the debtor consider to be the value of the property, and in making the loan the personal security of the debtor is scarcely ever taken into consideration. Now, if conditions suddenly change without any

fault on the part of the debtor, and as we think we have shown above, some suspicion at least of blame upon the creditor, and the property's value is forced down to less than the amount of the debt, is it not equitable and just that the creditor should be required to bear at least a share of the burden that he may or may not have forced upon his debtor. To say the least, the state ought not to punish the debtor with unusual severity, for his failure to perform the conditions of his contract under such circumstances.

ARGUMENT AND BRIEF.

We admit that if Kansas mortgages had the same force and effect as the common-law mortgage or as in *Bronson vs. Kinzie*, 1 Howard 311, then the act of 1893, as to pre-existing mortgages would be unconstitutional, for the reason that in that case the act would change the *terms* of the contract, just as an act changing the methods of sale provided for in trust deeds, which can be foreclosed according to the terms thereof without recourse to the judicial arm of the state government, would be unconstitutional. We admit further that if the act in question changes the terms of the contract in the slightest degree, it must be held unconstitutional as to such contract.

EFFECT OF THE KANSAS MORTGAGE.

The Kansas mortgage is not an absolute conveyance of the title to the property with a defeasence clause operative on certain conditions, it is simply a lien upon the property to secure the payment of the note mentioned in the instrument, it is a mere incident to the indebtedness secured by it and passes with the transfer of such indebtedness from one to another. Whatever the terms of such an instrument, it can only legally provide what the laws of the state sanction and such terms as the law recognizes, are alone the terms of the contract.

This Court in *Teal vs. Walker*, 111, U. S.,

page 242, has gone further than this, and said, "a contract contrary to the public policy of the state, although not expressly prohibited by law, cannot be enforced."

The mortgage in this case provides that it shall be construed in all respects according to the Kansas law.

The Supreme Court of Kansas by Mr. Justice Horton in *Waters vs. Devoe*, (18 Kansas, 233) says, "In this state the common law attributes of mortgages has been by statute wholly set aside and the ancient theories demolished; the mortgage is a mere security * * * vesting no title and giving no right of possession whatever, either before or after the breach. The statute confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises," and *Seckler vs. Delf* (25 Kansas, 165) Mr. Justice Valentine in the unanimous opinion of that court, in a suit by the assignee of the mortgagor, to recover rent collected by the assignee of the mortgagee says "It is therefore very important to ascertain the rights of the parties under the mortgage, and to examine the stipulations contained in the mortgage." There was a stipulation contained in the mortgage which reads:

"But if said sums of money, or any part thereof, or any interest thereon, be not paid when the same become due, then, in that case, the whole of said sums and interest shall by virtue of this mortgage immediately become due and payable; or, if the taxes and assessments of every nature which are or may be assessed or levied against said lands

and appurtenances, or any part thereof, are not paid at the time when the same are by law made due and payable, then in like manner the said notes, and the whole of said sums, shall immediately become due and payable; and upon the forfeiture of this mortgage, or in case of default of any of the payments herein provided for, the party of the second part shall be entitled to the possession of the said lands and appurtenances, and all the improvements thereon, and the rents, issues, and profits thereof; and the said party of the second part may then, and in any such case, immediately enter into and upon the lands hereby mortgaged, and all the buildings and improvements thereon, and may remove and put off and from said lands, buildings and improvements all and every person or persons whomsoever, forcibly if necessary, and may have, take, and retain possession of said lands, and the buildings and improvements thereon, and receive and take the rents, issues, and profits thereof; and a failure on the part of said party of the second part, his representatives or assigns, to take advantage of or to enter into or upon said lands, buildings and improvements, for or upon the happening of any forfeiture or forfeitures, shall not operate as a waiver thereof, and shall not preclude or bar him from taking advantage thereof, on the happening of any other forfeiture or cause for so doing."

"We now come to the main question involved in this case, to-wit: Did the said stipulation in said mortgage, without any foreclosure and without a receiver being appointed, give to the mortgagee

or to his assignee any right to take as his own the rents and profits of the mortgaged property? We must answer this question in the negative.

1. This mortgage was not a chattel mortgage in any respect; nor was it so treated or considered by any of the parties; but, on the contrary, it was a pure and simple real estate mortgage.

2. Nor was the mortgage intended to be a sale or conveyance of any of the property therein described. There was no intention that the mortgage should of itself, with or without a violation of any of its terms, transfer the title to any of the mortgaged property, either absolutely or conditionally, or otherwise; but on the contrary, it was intended that the instrument should be a mere mortgage, a security, a pledge, giving to the holder thereof only a lien upon the mortgaged property, to be enforced just as other real estate mortgage liens are enforced. A literal reading of the foregoing stipulation might seem to make the mortgage mean more than this; but, within the light of our own statutes and the decisions of this Court, a fair reading of the stipulations cannot make it mean more than we have stated. Comp. Laws 1879, p. 555, Sec 1; *Id.* p. 654, Sec. 399; *Chick vs. Willetts*, 2 Kans. 385; *Waterson vs. Devoe*, 18 Kans., 233. In this state a real estate mortgage conveys no estate or title, in whatever form the mortgage may be drawn, "it creates only a lien upon the mortgaged property. And such lien can be enforced only by a judgment or order of the district court. A holder of a real estate mortgage

cannot, even after condition broken, take possession of the mortgaged property, or of the rents or profits thereof, except by consent of all the parties, or by an action in the district court; and he cannot realize upon his mortgage except by judgment of such court. And this is true, whatever the form of the mortgage may be. Even if it were in form, a deed absolute, still in its nature and character it would be only a mortgage."

To the same effect see *Vanderslice vs. Knapp*, 20 Kansas, 649, where Justice Valentine says, "A mortgagee is a mere lien-holder; and whether he shall ever own any part of the mortgaged property depends upon whether it shall ever be foreclosed and whether he shall be the successful bidder," and where, as in this case, part of the property was removed, the court held replevin would not lie, because the mortgagor had the right of possession and could remove the timber, coal and anything else therefrom, unless it *unreasonably impaired* the mortgage security and then the remedy is not at law, but in equity; *Chick vs. Willets*, 2 Kan., 390. *Jennings vs. McKay*, 19 Kans., 122.

And to the same effect see *Teal vs. Walker*, 111 U. S. page 241; *Alexander vs. Shongo*, 20 Kans., 705; *Winston vs. Burnell*, 44 Kan., 367; *Thompson vs. Shirley*, 69 Fed. Rep., 484.

Under this construction of the mortgage contract, what term of the contract has been changed by the Act of 1893? How has its obligation been impaired? Has he been deprived in the slightest degree of any right secured to him by the terms of his contract?

We know he has not. The debt can not be discharged except by payment in full. The lien on the property can not be divested except by a sale, and if the government have the power to sell, it alone has the power to provide the manner and means it shall pursue in conducting such sale.

But opposing counsel say, in providing such means, having once provided a method which was in force when the contract was made, the state is prohibited by the Federal Constitution from changing this method as to such contract, because the remedy provided at the time the contract was made enters into it and becomes the obligation of the contract. On this proposition we take issue with them—and as the decision in this case must turn on this question, we now propose to devote our attention to it.

DOES THE REMEDY ENTER INTO THE CONTRACT.

This Court has always held that the remedy provided by law for the enforcement of contracts does not enter into the contract and become a part of it, and therefore that a change in the remedy does not impair the obligation of the contract. A few cases may be found in which language was used in delivering the opinion which on its face might be construed to mean that the remedy given by law to enforce the contract at the time it was made, entered into it and became a part of it, but examination of the facts to which the law was applied will disclose that this is not so, and these cases were decided on one of two grounds.

a. That the law will not tolerate the doing of that indirectly which is directly prohibited.

b. That there are two classes of remedies, viz: the remedy given by the contract itself, and the remedy given by the legislature for the enforcement of broken contracts. The former is part of the obligation of the contract, and the legislative act that takes that method of remedy away impairs the obligation of the contract.

The remedy provided by law may be changed as the wisdom of the legislature may direct; it is never put in operation until the contract is broken, and is not contemplated when the contract is made, for the reason that if the creditor thought he would be compelled to have recourse to the courts the contract would never have been made.

The rule is well stated in English and American Encp. of Law, Vol. 3, page 753, as follows: "The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts; but if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative." And the thought expressed by Justice Walker in *White vs. Haffeker*, 27 Ill., 349, is well worthy of considera-

tion, where he says, "When a judgment is rendered the cause of action ceases to exist. * * * Nor do the terms and conditions of the agreement enter into or form any part of the decree."

An examination of the cases will disclose that the laws on which the decisions adverse to the laws were rendered, either took away all remedy or took away a remedy which was provided by the contract itself, and therefore have no application to the case now before this Court, and however broad the language used in some of the cases may be, as said by Chief Justice Marshall in *Ogden vs. Saunders*, 12 Wheat., 333, and by Mr. Justice Miller in *Curtis vs. Whitney*, 13 Wall, 68, "That it is a general rule expressly recognized by the court in *Sturgis vs. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it was made."

In the latter case, 4 Wheaton, 122, A. D. 1819, Chief Justice Marshall, delivering the opinion of this court, shows conclusively that any law *which discharges* the debtor without the performance of his obligation, whether prospective or retrospective, controvenes the Federal Constitution, but the court draws a broad line between those laws which impair the obligation of the contract, and those which, by changing the remedy, effect in that way the legal enforcement of the contract, and says, page 200: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract,

the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract or may be allowed as a means of inducing him to perform it, but the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." Again, in relation to the words of prohibition in Sec. 10: "Those rules of construction which have been consecrated by the wisdom of ages, compel us to say that those words prohibit the passage of any law discharging a contract without performance." And again, in answer to the argument of counsel, that if this were so the rule would apply to Statutes of Limitation and Usury: "We do not think so; Statutes of Limitation relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed than dispense with its performance."

And in *McMillan vs. McNeil*, on page 212: "That the circumstances of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle."

Ogden vs. Saunders. In this case Ogden, the plaintiff in error, accepts drafts drawn on him in N. Y., in 1806. In April, 1813, he went through bankruptcy under a law of 1801.

Q. 1. Was the discharge in N. Y. a good bar?

Q. 2. Could it be plead in bar in Louisiana?

Q. 3. Did the constitution only prohibit laws that retrospectively impaired the obligation of a contract or those that prospectively did so as well?

Question 1 is answered by Washington, Thompson, Trimble & Johnson (who subsequently went over to the minority) in the affirmative. C. J. Marshall, Duval, and Story in the negative. The judgment below was against Ogden, the debtor. Marshall, Duval, Story, and Johnson voted to affirm, and evidently answered the question No. 2 in the negative. Washington, Thompson and Trimble dissented; Chief Justice Marshall argued in conformity with his opinion in *McMillan vs. McNeil*, quoted *supra:* The question as to what the framers of the constitution meant by the "obligation of a contract" was fully discussed by the Justices ranged on both sides of the questions decided in this case, and are therefore a safe guide, being the utterances of able Judges, cotemporaries of the framers of the constitution. We take the liberty of quoting first from the argument of Mr. Wheaton (against the constitutionality of the law), page 220, he says: "It may be admitted that the states have a right to modify the remedy so far as respects their own courts; that the *lex fori* may be changed in many respects; that the process for the collection of debts may be altered; still it does not follow that

a law taking away all remedy, whatever, and, in effect, abolishing the debt would be a valid act; unless such an act be a law impairing the obligation of contracts, it is difficult to conceive of such a law. Wherever there is a right there must be a remedy." And again talking of the *cessio bonorum* of the Roman law: "But it discharges the debtor's person only, leaving the subsequent acquisitions of the debtor liable to the demands of his creditors. It does not, therefore, impair the obligation of the contract, it only suspends and modifies the remedy." And again, page 225: "The states may make any and all regulations respecting contracts, provided they do not include among their regulations that lawful contracts shall have no obligation."

Mr. Webster also arguing against the constitutionality of the law says, page 240: "The obligation of a contract, that is the duty of performing it, is not created by the law of the particular place where it is made, and dependent upon that law for its existence; but it may subsist and does subsist without that law and independent of it. The obligation is in the contract itself in the assent of the parties and the sanction of universal law." This is the doctrine of Grotius, Vattel, Burlamaqui, and Rutherford. Let us illustrate this matter by an example: Two persons contract together in New York for the delivery by one to the other of a domestic animal. This is a lawful contract, and while the parties remain in New York is to be enforced by the laws of that state, but if they remove to Pennsylvania or Maryland

with the article, there a new law comes to act upon the contract, and to apply other remedies if it be broken. But suppose the parties go to a desert island beyond the reach of all law, the obligation of the contract still subsists and is as perfect as ever, and is now to be enforced by another law, that is, the law of nature. The right is as perfect here as it was in Pennsylvania, or even in New York, but this could not be so if the obligation were created by the law of New York, or was dependent upon that law for its existence, because the law of that state can have no operation beyond its territory. "The law is no part of the contract. What part is it? The promise? The consideration? The condition? Clearly it is neither of these. It is no term of the contract. It acts upon the contract only when it is broken. In judgments on contracts the damages are given and the imprisonment of the person, or a sale of goods awarded, not in performance of the contract or as a part of the contract, but as an indemnity for the breach of the contract. Even interest which is a strong case, where it is not expressed in the contract itself, can only be given as damages." See same doctrine in late case of *Morley vs. C. & L. S. R. R., post.* "It is nearly absurd to say that a man's goods are sold on a *fieri facios*, or that he himself goes to jail in pursuance of his contract."

The same doctrine is enunciated in the opinions delivered by the justices in favor of the law as in those against it. And these opinions ought to be given great weight in the determination of

the question as to what was intended to be covered by the constitutional prohibition.

Justice Johnson in his opinion, in support of the law, speaking of whether or not the states were left the power by the constitution to enact a bankrupt law, says, "Had the constitution been so jealous of the exercise of this power in the states, it is not credible that they would have left unimpaired those unquestionable powers over the administration of justice which the states do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person no one doubts may be exempt from execution; there is high precedent for exempting his land, and public policy would fully sustain an exemption of his slaves. What is to prevent the extension of exemption until nothing is left but the mere mockery of a judgment without the means of enforcing its satisfaction? But it is not only in their execution laws that the creditor has been left to the justice and honor of the states for his security. Every judiciary in the union owes its existence to some legislative act. What is to prevent a repeal of that act? And then what becomes of his remedy? Or what is to prevent the extension of the right to imparl? Of the time to plead? Of the interval between the sittings of the state courts? Where is the remedy against all this? Why were not these powers taken also from the states if they could not be trusted with the subordinate and incidental power here denied them, viz: to pass a bankrupt law.

"It may be called the ruling principle of the

constitution to interfere as little as possible between the citizen and his own state government, and hence, with a few safeguards of a very general nature, the executive, legislative and judicial functions of the state are left as they were, as to their own citizens and as to all internal concerns."

Page 282: "Right and obligation are considered by all ethetical writers as correlative terms; whatever I, by my contract give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. * * *

"The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation, for the rights of all must be held in subserviency to the good of the whole. The state construes them, the state controls them, and the state decides how far the social exercises of the rights they give us over each other can be justly asserted."

I say the social exercise of these rights, because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen. Yet, it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society, in their application to the class of contracts under consideration. Two men, A and B, having no previous connection with each other (we may suppose them even of hostile nations), are

thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other and he contracts to return an equivalent in kind. It is obvious here that B subjects himself to something more than the moral obligation of his contract, and that the law of nature, and the sense of mankind, would justify A in resorting to any means in his power to compel a compliance with this contract. But, if it should appear that B, by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B would be followed with the indignation of mankind. He has carried the power conferred on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. "*Summum jus est summa injuria.*"

The progress of parties, from the initiation to the consummation of their rights, is exactly parallel to this in a state of society, with this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members; and for the construction and enforcement of their contracts, they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them

the acknowledged duties of government to society, according to received principles of equal justice. The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce a fulfillment of contracts; and, if, even in a state of nature, limits were prescribed by the reason and nature of things, to the exercise of individual power in exacting the fulfillment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and, both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency, in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family and the community.

When that state of things has arrived in which the community has fully and fairly discharged its duties to the creditor, and in which pursuing the debtor any longer would destroy the one without benefitting the other, must always be determined by the common guardian of the rights of both. This grows out of the administration of justice and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor and his family. A similar notion now prevails on the

coast of Africa and is often exercised there by brute force. It is worthy only of the country in which it now exists and of that state of society in which it once originated and prevailed. "*Lex non cogit ad impossibilia*," is a maxim applied by law to the contracts of parties in a hundred ways, and where is the objection in a moral or political view to applying it to the exercise of the power to relieve insolvents?

It is in analogy with this maxim that the power to relieve them is exercised, and if it never was imagined that, in other cases, this maxim violated the obligation of contracts, I see no reason why the fair, ordinary and reasonable exercise of it in this instance should be subjected to that imputation. If it be objected to these views of the subject, that they are as applicable to the contracts prior to the law as to those posterior to it, and, therefore, inconsistent with the decision in the case of *Sturges vs. Crowninshield*, my reply is, that I think this no objection to its correctness. I entertained this opinion then and have seen no reason to doubt it since. But if applicable to the case of prior debts, *multo fortrori*, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded. I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable and infinitely more restrictive on state power than the doctrine contended for by the oppo-

site party. Since, if the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice.

The law of the contract remains the same and it will remain the same everywhere and in every tribunal, but the remedy necessarily varies and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. * * * The citizens of other states have the institutions of the Federal government to resort to, and this is all the security the constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts and their own jurisprudence.

And again, page 287: "And for instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of the legislature, of judges, of persons attending courts or going to elections; the preference given in the marshalling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and above all the acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation if the modification of the remedy against the debtor implied in the discharge of insolvents is unconstitutional. * * * The right then of the creditor to the aid of the public arm for the recovery of contracts is not absolute and unlimited, for it may be modified by the necessities or policy of societies."

Page 292: "No one questions the powers of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this, that it is equally the duty and right of government to impose limits to the avarice and tyranny of individuals so as not to suffer oppression to be exercised under the semblance of right and justice."

Mr. Justice Thompson, on page 300, says:

"That it is not intended to interfere with or limit state legislation in relation to the remedy in the ordinary prosecution of suits no one can doubt."

And Mr. Justice Trimble, page 327, says:

"A great variety of instances may readily be imagined in which the legislature of a state might alter, modify or repeal existing remedies, and enact others in their stead without the slightest ground for a supposition that the new law impaired the obligation of contracts."

Mr. Justice Marshall, one of the greatest jurists that ever sat upon the bench of the Supreme Court, or of any other court, in his opinion says, page 338: "That the plaintiff in error insists that the law enters into the contract so completely as to become a constituent part of it; that it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors in pursuance of the act of the legislature. This is unquestionably pressing the argument very far, and the establishment of

the principle leads inevitably to consequences which would affect society deeply and seriously."

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor; it would have constituted the obligation of his contract, and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional because it operates on pre-existing agreements. If a law, authorizing debtors to discharge themselves from their debts by surrendering their property, enters into the contract and forms a part of it; if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair the obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration, is to impair its obligation. Are gentlemen prepared to say that an insolvent law once enacted must, to a considerable extent, be permanent; that the legislature is incapable of varying it so far as respects existing contracts? Page 339: "We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties."

"This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the

subject. A legislative act then declaring that all contracts should be subject to legislative control and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one in which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate and be construed into an inanimate, inoperative and unmeaning clause." (We regret that we have not space for the balance of this portion of the opinion on page 340.)

Page 343: "If the law become a part of the contract, change of place would not expunge the conditions. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate. We have, then, no hesitation in saying that however law may act upon contracts, it does not enter into them and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts." And again, page 344: "But although the argument of the plaintiff in error is not sustainable in this form, it assumes another." * *

"The defendants maintain that an error lies at the very foundation of this argument. It as-

sumes that contract is the mere creature of society and derives all its obligations from human legislation; that it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs; that he shall perform what he has undertaken to perform; that though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts." This postulate the defendants deny and we think with good reason. See pages 344-5-6-8-9 and page 351. "The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy, and it would seem to follow that the law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect due to intelligent beings understanding their duties and willing to perform them, not as insane beings who must be compelled to act for self preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce them.

Should a state abolish its courts and thereby withhold all remedy, would this annihilation of

remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another state the remedy would be immediately applied and the inherent obligation of the contract enforced.

This cannot be ascribed to a renewal of the obligation, for passing the line of a state cannot re-create an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired, though the remedy was withdrawn, and to the same effect on pages 351, 352 and 353. Page 354:

"The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these:

1. That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective as well as a retrospective operation.

2. That an act of the legislature does not enter into the contract and become one of the conditions stipulated by the parties, nor does it act externally upon the agreement, unless it have the full force of law.

3. That contracts derive their obligation from the act of the parties, not from the grant of government, and that the right of government to regulate the manner in which they should be performed, or to prohibit such as may be against the

policy of the state, is entirely consistent with their inviolability after they have been formed.

4. That the obligation of a contract is not identified with the means which government may furnish to enforce it, and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

"It is also worthy of consideration that those laws which had effected all the mischief the constitution intended to prevent, were prospective as well as retrospective in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons we are of the opinion that on this point the district court of Louisiana has decided rightly."

This is the language of the two best considered and most frequently cited cases upon this constitutional question, and although in the opinions of so many different judges, there is considerable difference of view as to the effect of these particular bankrupt laws on contracts, prospective or retrospective.

It is clearly shown that a bankrupt law is not a law relating to the remedy, as it is not pretended by such laws to enforce the obligation of a contract, but rather to release the debtor from its obligation

and to discharge the contract absolutely by payment of only a part thereof; and further, that a law pertaining to the remedy does not enter into or become a part of the contract, but it is simply the means provided by society to the injured party to enforce the terms of his contract.

The right to regulate the remedy and modify the obligation are not the same; they originate at different times. The obligation is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of its performance.

The remedy acts upon a broken contract, and enforces a pre-existing obligation.

In *Green vs. Biddle*, 8 Wheaton, page 1, A. D. 1823, was a case in which the contract between Kentucky and Virginia stipulated that the rights and interests in land ceded should be determined by the laws of Virginia at the time of the compact; Kentucky passed new laws, changing the provisions of the Virginia laws, and these new laws were held unconstitutional, and this decision fully illustrates the views above set forth, that although the laws of Kentucky, on their face, appeared only to affect the remedy, yet, as a matter of fact, they impaired the obligation of the contract, because the terms of said contract were, that the rights and interests in the lands should be determined by the laws of Virginia, as they then stood. Not because it was the law under which the party—owners of the land—took their title, but because the compact between the states by its terms so provided.

And in *Mason vs. Haile*, 12 Wheaton, 378,

Mr. Justice Thompson, delivering the opinion of the court, says, "Can it be doubted but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present, as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. And if such a general law would be valid under the Constitution of the United States, where is the prohibition to be found, that denies to the State of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only, they do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of *Sturges vs. Crowninshield* (4 Wheat. Rep., 200), applies with full force to the present case. "Imprisonment of the debtor," say the court, "may be a punishment for not performing his contract, or may be allowed as a means for inducing him to perform it

"But a state may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

The next case we find in the reports is *Satterlee vs. Matheson*, 2 Peters, 381, A. D. 1829. Satterlee and Matheson held land in Luzerne county, Pennsylvania, in common under a Connecticut

title; a division of the land was made between them and Satterlee became the tenant of Matheson of his part of the land, thus set out in severalty under a lease to be terminated on a notice of one year; Satterlee afterwards obtained a Pennsylvania title to the land leased to him by Matheson and on a trial in an ejectment suit for the land brought by Matheson against Satterlee, the Court of Common Pleas of Bradford county, Pennsylvania, held that Satterlee having held the land as a tenant of Matheson could not set up a title against his landlord; upon a writ of error to the Supreme Court of Pennsylvania, in 1825, it was held "That the relation of landlord and tenant could not exist between persons holding under a Connecticut title." The legislature of Pennsylvania on the 8th of April, 1826, passed an act declaring that the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the commonwealth. The case came again before the Supreme Court of Pennsylvania and the judgment of the Court of Common Pleas of Bradford county, in favor of Matheson, the landlord, was affirmed, that court having decided that the act of the assembly of April 8th, 1826, was a constitutional act and did not impair the validity of any contract. Satterlee brought a writ of error to this court claiming that the act of 1826 was unconstitutional. Held that the act was constitutional. And in the opinion delivered by Mr. Justice Washington the question of vested rights which we hear so much of in this class of cases is forcibly exploded. The Court says, page

413, "The objection, however, which was most pressed upon the Court, was that the effect of this act was to divest rights which were vested by law in Satterlee."

"There is certainly no part of the constitution of the U. S. which applies to a state law of this description, nor are we aware of any decision of this, or any circuit court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract, and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned." And speaking of Fletcher versus Peck: "It is nowhere intimated in that opinion that a statute which divests a vested right is repugnant to the constitution of the U. S.

The next case is *Bank of Hamilton vs. Dudley*, quoted page 7, this brief.

Next is *Jackson vs. Lamphire*, 3 Peters,390,A. D. 1830. The question between the parties is which of the deeds carried the title. At their execution the earliest in date carried it. Mr. Justice Baldwin, delivering the opinion of the court, says, "This is the legal result of the deeds, but there is no contract on the part of the state that the priority of title shall depend solely on the principles of the Common Law, or that the state shall pass no law, imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered.

Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the ob-

ligation of contracts." In the case of *Cook vs. Moffet*, 5 Howard, 312, a bankrupt law case decided in 1847, Mr. Justice McLean says, "The notion that such a law becomes a part of the contract is in my judgment fallacious. Whatever constitutes a part of a contract is inseparably connected with it and governs it wherever it may be enforced; all other forms and modes of proceeding which affect the contract belong to the remedy."

There was no diversity of opinion in the foregoing cases, upon the question that the remedy did not enter into the contract and, however, the members of this court differed as to the constitutionality of the bankrupt law in the cases in which that question was involved, they all conceded that the remedy did not enter into the contract and become a part of it.

The Constitution, in theory at least, cannot change. It lives while the government survives and can only be altered by the means within itself provided. The only change therefore that can be made is by construction, and it must clearly appear that the above reasoning of the cotemporaries of the constitution is clearly wrong, and abler minds must succeed in pointing out the fallacy of the above arguments. All such efforts have so far been entirely unsuccessful.

The opposing counsel seem to think that some of the later decisions are in conflict with the doctrine above stated; a careful reading of the cases will clearly prove they are mistaken.

Nearly every case cites with approval one or more of the above cases, and while the provocation

has been great to cross the line drawn between laws impairing the obligation and those pertaining to the remedy, and although there are many contradictory statements made *arguendo* in the decided cases, yet we think when the facts on which each particular case has been decided are fully examined, we will find that they all blend into one harmonious whole. The provocation was great in *Walker vs. Whitehead*, 16 Wall, 314, *post*, where the State of Georgia passed a law in 1870 by which it is enacted that all suits,on contracts entered into prior to the year 1865, that the debtor may set up and allege as a valid counter-claim any losses he may have sustained by reason of the civil war. It cannot be said that this was a law pertaining to the remedy, and even if it were the intent of it was only too manifest, that it was intended to discharge the contract without performance, and it is a well known principle that the law will not tolerate the doing of that indirectly which it directly prohibits. If we only read the language used in the opinion, without reference to the facts in the case, it would be difficult to reconcile the language used in this case with that used in nearly every other.

We propose now to examine these later cases, and see if it be true that the rule asserted in *Sturgis vs. Crowninshield*, and *Ogden vs. Saunders*, has been altered. The leading case, and the one most frequently referred to by those who contend against the constitutionality of this law is *Bronson vs. Kinzie*, submitted without brief or argument in support of the law, decided in 1843 and reported in 1 Howard, 311. This was a case in which

the constitutionality of a law of Illinois, passed subsequent to the date of the mortgage, which gave the mortgagor twelve months and judgment creditors fifteen months to redeem after sale, and another law, that sale should not be made except property should bring two-thirds of the appraised value, were held unconstitutional. It must be borne in mind that the mortgage by its terms conveyed the absolute title to the mortgagee, and authorized him upon condition broken to sell this property at public auction, as the attorney of the mortagor, and convey an absolute title to the purchaser, and the laws of Illinois at that time sanctioned such contracts.

Chief Justice Taney, in delivering the opinion of the court, says, "And Kinzie covenanted that if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction," etc., (without the aid of any judicial remedy).

"If the laws of the state, passed afterwards, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection, for undoubtedly a state may regulate at pleasure the modes of proceeding in its courts, in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the Statute of Limitations. It may, if it thinks proper, direct the necessary implements of agriculture or the tools of the

mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to executions or judgments."

"Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it. * * * * * And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract." (But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. This must be taken in connection with the statement of the court *supra* as to the distinction between obligation and remedy.)

"It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alteration of the remedy and provisions which in the form of remedy impair the right. But it is manifest that the obligation of the contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions so as to make the remedy h[illegible]ly worth pursuing." * *

Page 318: "We proceed to apply these principles to the case before us, according to the long settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law. The legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law he had a right to sue and recover the land itself." * *

"This is his right by the law of the contract, and it is the duty of the court to maintain it and enforce it without any unreasonable delay. When this contract was made *no statute had been passed* by the state *changing the rules of law or equity* in relation to a contract of this kind. None such at least have been brought to the notice of the court." (Italics ours.) The court here meant as to the right to the legal title and the absolute right to sell upon default without the intervention of the courts, and this is the feature which distinguishes the Kansas mortgage. In speaking of the law the court says: "The law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made." * * * * *

"It is impossible to read this covenant (in mortgage) and compare it with the laws now under consideration without seeing that both of these acts

materially interfere with the express agreement of the parties contained in this covenant." (Italics ours.)

If the court will read the quotation from this case, in italics, page 53 of the opposing counsel's brief and bear in mind that it simply refers to the law governing the construction and effect of the contract, and that this is its meaning is plainly shown in the fourth line following. We think that quotation will be found to sustain our position; and in the following lines reading, "to enforce the performance by the remedies then in force" the court meant the remedies in force at the time the remedy is sought.

Mr. Justice McLean dissented from the judgment in this case, on the ground that the constitutionality of the laws were unnecessarily decided and says: "It is the more to be regretted as there was no argument, oral or written, to sustain these laws."

"Some restrictions on the sale of land on execution is required by a sound policy, especially in new and rising states where real property can scarcely be said to have a final value, and cites *Satterlee vs. Matheson*, 2 Peters, 407, saying: "There was direct legislation not only on existing rights growing out of contracts, but such an effect was given to the law as to divest vested rights, and yet it was held constitutional."

"A state legislature cannot impair the contract by changing the time or manner of its performance. By the contract the parties have fixed their rights and obligations, and these are guarded by

the Constitution. But the remedy for the enforcement of the contract, being established by the law-making power, may be modified at its discretion."

In *McCracken vs. Hayward*, 2 Howard, 611, 1844, from the C. C. U. S. Dist. Ill., plaintiff obtained judgment in 1840. The law requiring land sold on execution to bring two-thirds appraised value was passed February 18, 1841. The main question submitted was, whether the court will or will not direct the enforcement of said judgment according to the laws regulating the remedy, when such *judgment was entered* and the contract made, which was answered in the certificate in the affirmative. (Italics ours.) There is a great deal more said than is necessary to decide this case in the opinion rendered by Mr. Justice Baldwin, respecting matters not before the court for decision, and with reference to such matter it is only necessary to quote the words of Chief Justice Marshall in *Ogden vs. Saunders*, page 333: "That it is a general rule expressly recognized by the court in *Sturgis vs. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made." And such language must be construed with reference to what has heretofore been the settled rulings of the court, except a plain intent is shown to change said former rulings. There can be no question that in *McCracken vs. Hayward* the judgment fixed the status of the parties, just as the Supreme Court of Kansas decided at the last term in the case of *Greenwood vs. Butler*, 52 Kansas, 424, and the constitutionality of

the act was not properly before the court. But in that case, (*McCracken vs. Hayward*) the court in its opinion says: "In placing the obligation of contracts under the protection of the constitution its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution, annulling all state legislation which impaired the obligation, it was left with the states to prescribe and shape the remedy to enforce it." And again, referring to *Bronson vs. Kinzie*, "It is not to be understood by that, or any former decision of this court, that all state legislation on existing contracts is repugnant to the Constitution."

Thus it is clearly shown that the quotation from this case, page 34 of the gentlemen's brief, referred only to the laws which apply to the construction and effect of the contract.

It might also be said that appraisement laws and those regulating the equity of redemption depend upon entirely different principles. An appraisement law might operate to take away all remedy and thus impair the obligation, while a redemption law only gives the debtor a limited period to preserve that which is his, and in the law now before this Court, hastens the sale to the advantage of the creditor.

The next case is *Gantley vs. Ewing*, 3 Howard, 708—1845, cited page 54, opposing counsel's brief, appealed from the Circuit Court of the United States for the district of Indiana. Suit to set aside a sheriff's deed in a foreclosure of a common law mortgage, in which the judgment was ren-

dered in 1840, directing if judgment not paid in sixty days execution issue for the sale of the premises. Execution issued January, 1841, and on the 13th day of February following and before the sale, an appraisement law was passed which was published February 23rd, 1841. The sheriff having given due notice, sold the property on the 18th day of March, 1841. Question: Did the law of 1841 apply—was certified on division of the court below."

All that was necessary to decide in this case was, that the decree fixed the status of the parties and that all proceedings thenceforth must be in conformity with the terms of the decree, there being no appeal from the courts to the legislature. The court, however, went on to discuss the obligations of the contract and the remedy to enforce it and cites approvingly from *Bronson vs. Kinzie*, 319, cited *supra*, where Chief Justice Taney dwells upon the obligation in a common law mortgage already noted. The court then goes on to say: "The decree ordering foreclosure was made in conformity to the existing laws at the date of the mortgage and of the decree. An execution sale was the appropriate mode of foreclosure, and this without any of the restrictions contained in the act of Feb. 13, 1841." "The new remedy prescribed by the act of 1841 *changed the contract.* * * * If the legislature could make this *alteration in the contract* and in the decree enforcing it, it could declare the property should not be sold at all." (Italics ours.)

"Laws imposing restrictions and conditions on

the mortgagee in the enforcement of his contract and which affected its substance, impairs the obligation and cannot prevail, as an act directly prohibited cannot be done indirectly."

We think that the cases up to this time simply hold that the obligation of a contract is the terms of the contract, that which the obligor agrees to do for the obligee. That any law which discharges this contract without fulfillment, whether it be directed to the validity, the construction or the fulfillment (discharge) of the contract. Whether the law purports to act on the contract or the remedy; if it acts upon the contract and has the effect directly or indirectly to discharge it without payment, it is unconstitutional as far as it changes the terms of the contract.

That all laws which control the contract as a contract, such as laws that decide its validity and construction, enter into and become a part of it and travel with it wherever it goes, but the laws pertaining to the procedure in the courts only apply to the contract after it is broken and then only when sought to be enforced in their jurisdiction.

The next case is *Curran vs. State*, 15 Howard, 304, A. D. 1853.

In this case the legislature of the State of Arkansas charted the State Bank and furnished its total capital. Bills of the bank were issued payable to bearer; afterwards the state (the bank being insolvent and its capital dissipated) withdrew the assets of the bank by acts vesting all its real estate in the state and appropriating its cash assets to pay the legislature and otherwise; thus the

state, the sole stockholder, appropriated the assets of the bank and left the bill holders and depositors without remedy. These acts the Supreme Court held unconstitutional and the court said: "The law now in question withdraws the real property of the bank altogether from the reach of legal process; provides no substituted remedy and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, 'in a condition in which his rights live but in grace, and his remedies in entreaty only.'" While this decision is rendered on the ground that the laws in question withdrew all remedy, and thus impaired the obligation, it would seem that the real question was that the law withdrew the right and not the remedy and thus divesting vested rights was unconstitutional.

Next case is *Howard vs. Bugbee*, 24 Howard, 461, A. D. 1861.

This was a common law mortgage as in *Bronson vs. Kinzie*, counsel for the plaintiffs in error, says, page 461: "*By the terms of the mortgage the estate became absolute on default* of payment.

The statute in question provides for a sale, subject to redemption in two years. The mortgage, in effect, *stipulates* for an absolute sale after default. The statute, therefore, does not merely change the remedy but impairs the obligation of the contract. The court does not enter into any discussion of the law, but on these facts held the act unconstitutional on the authority of *Bronson vs. Kinzie*.

The next case, *U. S. ex rel. Von Hoffman vs. Quincy*, 71 U. S., 535, A. D. 1866. This is a case where bonds were issued under a law in which was provided the means of payment, which means were withdrawn after the issue and sale of the bonds, no other means being provided. The law withdrawing the means was held unconstitutional because it took away, not only a remedy given by the contract, but all remedy and thus sought to do indirectly that which was directly prohibited. This is a case on which opposing counsel strongly rely. It will be found that their citation from it, like all the others relied on by them, will not on examination sustain their position and we will add to the quotation by them from this case, on page 54 of their brief, the following also from it: "This has reference to legislation which effects the contract directly, and not incidentally or only by consequence;" (The law of the remedy when not embodied in the contract can only effect its obligation incidentally), and again the court says further:

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right *secured by the contract* is thereby impaired; no attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." (Italics ours.) Again, speaking of the rulings that the remedy was no

part of the contract. "If these doctrines were *res intergroe*, the consistency and soundness of the reasoning which maintains a distinction between the contract, and the remedy might perhaps well be doubted; but they rest in this court upon a foundation of authority too firm to be shaken, and they are supported by such an array of judicial names, that is hard for the mind not to feel constrained that they are correct."

Clark vs. Reyburn, 8 Wall, 318, A. D. 1868, a decree of strict foreclosure was entered on a Kansas mortgage in the United States circuit court. There was no act of congress nor state statute nor rule of court forbidding this practice, nor purporting to give any time to redeem after foreclosure—yet the Court reversed the decree, and fully recognized the debtor's equitable estate; see Chief Justice Marshall, citation of this case, page 35 of record.

Next is *U. S. vs. Muscatine*, 8 Wall 575, A. D. 1869.

This is another tax levy bond case where the remedy was prescribed in the contract and the Court follows *U. S. vs. Quincy*.

Curtis vs. Whitney, 13 Wall., 68, A. D. 1871, is the next case decided.

Mr. Justice Miller, in delivering the opinion of the Court, says, "That a statute is not void because it is retrospective, has been repeatedly held by this Court. * * * Nor does every statute which effects the value of a contract impair its obligation. It is one of the contingencies to which parties now look in making a large class of contracts that they may be affected in many ways by state and

national legislation. For such legislation demanded by the public good, however, it may retroact on contracts previously made and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party; there is no restraint in the Federal Constitution as long as the obligation of performance remains in full force. * * * The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned."

In *Walker vs. Whitehead*, 16 Wall., 317, A. D. 1872, the next case.

Mr. Justice Swayne, delivering the opinion, says: "The states may change the remedy, provided no substantial rights secured by the contract are impaired."

(This could not be if the remedy entered into the contract and became a part of it.) This was a Georgia case, allowing the debtor in all suits instituted after January 1st, 1865, to plead as an offset and counter claim *any loss* he might have sustained by reason of the civil war, whether such loss was occasioned by the destruction of his property or its depreciation in value.

The law was rightly held unconstitutional because it was an effort to do indirectly that which was directly prohibited.

Gunn vs. Barring, 15 Wall.,610, A. D. 1872, next decided, is of the same class, only stronger, there being here a judgment, the lien of which was divested by the act in question.

Memphis vs. U. S., 97 U. S., 293, A. D.

1877, is next. There is no special application in this case. It simply decides that a law exempting new territory added to a city from taxation for the debts of the city as originally constituted, even though the act incorporating it in the city did not exempt it, was constitutional and did not impair the obligation of a contract.

Edwards vs. Kersey, 5 Otto, 595, A. D. 1877, is next.

By the laws under discussion, all the property of the debtor was exempted, and the law was held unconstitutional. Mr. Justice Clifford in his concurring opinion, says: "State legislation may change existing remedies and substitute others in their place, and if the new remedy is not unreasonable, and will enable the party to enforce his rights without new and burdensome restrictions, the party is bound to pursue the new remedy, the rule being that a state legislature may regulate, at pleasure, the modes of proceeding in relation to past contracts, as well as those made subsequent to the new legislation." Mr. Justice Harlan dissented from the judgment in this case.

See language Chief Justice Martin, page 32, record.

Next, *Tenn. vs. Sneed*, 6 Otto, 69, A. D. 1877, is a case in which the law of Tennessee, chartering the bank of Tennessee, provided that its notes were to be received in payment of taxes, a subsequent law prohibited their receipt for taxes; plaintiff brought mandamus, claiming that the law impaired the obligation of contracts, and the law was held constitutional.

The court says: "Our own reports and those of the states, are full of cases holding that the legislature may alter and modify the remedy to enforce a contract, without impairing its obligation; on the general subject and for numerous illustrations reference is made to the following cases, citing *Bronson vs. Kinzie*, *Van Hoffman vs. Quincy*, *Bruce vs. Schuler*, 9 Ill., 221, in each of which a large number of cases is collected."

"If a particular form of proceeding is prohibited and another is left or is provided, which provides an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired; citing *Bronson vs. Kinzie*, *Huntzigher vs. Brock*, 3 Grant cases, 243, *Evans vs. Montgomery*, 3 Watts and Serg 218; *Read vs. Black*, 23 Maine, 318."

"The rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right; *Bronson vs. Kinzie*, *supra*.

This case was cited approvingly in *Brine vs. Ins. Co.*, 96 U. S., 627, A. D. 1877, and is reconsidered and approved in *Antonia vs. Greenhow*, 107 U. S., 468, A. D. 1883.

Brine vs. Ins. Co., 96 U. S.,627, A. D. 1877, is next.

Foreclosure was sought to be made in the Federal Court without giving time to redeem.

In writing the opinion Mr. Justice Miller

says: "There is no doubt a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties, and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tenn. vs. Sneed*, Ante 610, it was held that so long as there remained a sufficient remedy on the contract, an act of the legislature changing the form of the remedy did not impair the obligation of the contract."

In Pennman's case, 13 Otto, 714, A. D. 1880, the next case decided, Mr. Justice Woods says:

"In modes of proceeding and forms to enforce the contract, the legislature has the control and may enlarge, limit or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right." Here a law taking away the right to imprison for debt was held constitutional.

The next case is *Louisiana vs. New Orleans*, 102 U. S., 203, A. D. 1880, and is one of the cases relied on by counsel; but the quotation cited from the opinion of Mr. Justice Field is clearly against them when we read it, with the knowledge that the judgments were based upon bonds, the law authorizing which provided a means of payment, and when we consider that although the act in that case took away the remedy formerly provided by mandamus, and required the judgments to be filed with the comptroller, to be paid in the order of filing when funds were in the treasury, yet that this court held the act constitutional.

And Mr. Justice Field stated the full length

to which this doctrine can go when he said: "The usual mode in which municipal bodies meet their pecuniary contracts is by taxation, and when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy."

See remarks of Chief Justice Martin, page 31, printed record.

Antonia vs. Greenhow, 107 U. S., 468, A. D. 1883, is next decided.

Mr. Chief Justice Waite delivered the opinion, the court here reconsidered and approved the case of *Tenn. vs. Sneed*, *supra*, and although in this case the act practically took away the right of mandamus, postponed the remedy of the creditor until the termination of litigation that might take years, and finally, whether successful or unsuccessful in his suit, made him pay the costs, (which amounted to more than his claim) yet the court held the act constitutional. Perhaps the court went to the opposite extreme from *Walker vs. Whitehead*, and *Edwards vs. Kersey*, yet this is the later decision, and therefore governs.

Conn. Mut. Life Ins. Co. vs. Cushman, 108 U. S. 51, A. D. 1883, is next decided.

This was a case, in which the act passed after the note and mortgage were made, provided the mortgagor might redeem by paying amount of bid with interest at 8 per cent; the former law required 10 per cent, (difference of about $2,000) the mort-

gagee was the purchaser. Mr. Justice Harlan, delivering the opinion, says: "The laws, with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. The rights of the purchaser at the decretal sale were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred."

The rule in this case applies in every particular to the case now before this Court, as the act of '93 applies only after the sale, and regulates only the relations between the mortgagor and the purchaser.

To illustrate this, let us use Mr. Justice Harlan's language, with the subject matter changed from "interest" to "period of redemption:"

"The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it as purchaser, to conform to the terms for the redemption of the property as prescribed by statute at the time of the purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position as purchaser, subject necessarily to the law then in force, defining the rights of the purchaser.

"But it is *insisted that the value of the mortgage contract was impaired*, that the extension of the period of redemption would lessen the number of bidders seeking investment and thereby injuriously affect the value of the mortgage security, and in support of this proposition counsel cited *Green vs. Biddle*, *McCracken vs. Hayward*, *Planters' Bank vs. Sharpe*, and *Edwards vs. Kersey*.

"These decisions clearly have no application to the case now before the court. The laws, with reference to which the parties must be assumed to have contracted when the mortgage was executed, were those which in their direct and necessary legal operation controlled or affected the obligation of such contract. We have seen that no extension of the period of redemption, as between the purchaser of the mortgaged property at decretal sale and the party entitled to redeem, affected or could possibly affect the right of the Ins. Co. to receive, or the duty of the mortgagor to pay the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale.

The extension of the period of redemption by the act of 1893 was by way of relief to the mortgagor and his judgment creditors, and in no sense any injury to the mortgagee. When that act was passed there was no person to answer the description, or to claim the rights of a purchaser; consequently no existing rights were thereby impaired. That the extension of the period of redemption would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are

plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract."

But counsel say "that the mortgagee received all that it was entitled to demand." If they will examine the records of the Circuit Court of the U. S., at Chicago, they will find a "deficiency" judgment was taken in this case after the sale, against Sherman Leland, administrator of Cushman.

Vance vs. Vance, 108 U. S., 514, A. D. 1883, next decided.

By the act here in question tacit mortgages were abolished, both past and future, yet the act was held constitutional. Mr. Justice Miller, after citing approvingly the language in *Curtis vs. Whitney*, *supra*, says: "The right of the state to prescribe the time within which existing rights shall be prosecuted and the means by, and conditions on which they may be continued in force is, we think, undoubted."

Gilfillan vs. Union Canal Co., 109 U. S. 401, A. D. 1883, is next.

The court held that a subsequent legislative act requiring bondholders to notify the corporation whether they agreed to a proposition for the funding of the bonds and holding them bound, if they did not give notice; held constitutional.

Chief Justice Waite, delivering the opinion, said, quoting approvingly "*Terry vs. Anderson*;" in which the court said: "In all such cases, the

question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. * * * In judging of that we must place ourselves in the position of the legislators * * * for what is reasonable in a particular case depends upon its particular facts."

Mobile vs. Watson, 116 U. S. 305, A. D. 1885, is next decided.

This case, like the majority of the cases, beyond question sustains our position, that only when the new law takes away a remedy given by the terms of the contract, is it unconstitutional.

The City of Mobile was authorized by the legislature to issue a million in bonds to the Mobile & C. R. R. Co., and to provide ninety-five thousand annually to pay bonds and coupons as they came due, by a special tax to be levied and collected for that purpose. Afterwards the city defaulted, and the legislature annulled its charter and dissolved the corporation, but on the same day created a new corporation called the Port of Mobile, created a board called the Mobile Police Board, who were authorized to collect all taxes, etc., but restricted them to collect only a tax of 6-10 of one per cent for the purpose of carrying out the provisions of the act. Thus doing what evidently was intended, preventing the collection of these bonds either by the method provided therein, or otherwise. The court says: "If, therefore, the plaintiff cannot exact payment * * * the effect of the legislation referred to is to deprive him of all remedy on the bonds * * * and on the

contract providing for their payment, valid when made, and valid still."

Campbell vs. Holt, 115 U. S., 620, A. D. 1886, is next decided; the act in this case removed the bar of the statute of limitations which had already run.

Justice Miller, delivering the opinion, speaking of the authority of the legislature to change the remedy, says: "The right does not enter into or become a part of the contract," and citing approvingly from *Foster vs. Essex*, 16 Mass., 245, "and a legislature which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes and providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority."

Bank vs. Franklin, 120 U. S. 747, A. D. 1887, is next. In this case the question was whether an act of the legislature, passed after the debt was contracted, changing the remedy from a right summarily on attachment against the corporation, to attach the body and property of a stockholder for the debts of the corporation, to one limiting the creditor to the bringing of a bill in equity or to an action at law, after first having obtained judgment against the corporation and having a return, no property found on execution, was constitutional.

Mr. Justice Gray, delivering the opinion, says: "As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of the remedy and the rules of evidence. It is not doubted that it is a constitutional exercise of the powers of the legisla-

ture even as applied to debts contracted by the corporation before its enactment," and cites approvingly *Ogden vs. Saunders*, *Hawthorn vs. Calef*, Penman's case, *Webb vs. Don*, *Curtis vs. Whitney*, and *Tenn. vs. Sneed*.

The next case is *Siebert vs. Lewis*, 122 U. S. 284, A. D. 1887. This is a bond case in which the remedy was provided in the act authorizing the issue, therefore the remedy was a part of the contract, and was printed on the bond; Sec. 2 of the act provided, in order to meet the payments * * * * the county court shall from time to time levy and cause to be collected, *in the same manner* as county taxes, a special tax, etc.

It seems while this act was in force the plaintiff obtained judgment in the circuit court, and had an actual levy of a tax according to its provisions, and the Court says "his right thereto became thereby vested so as not to be affected by a subsequent repeal of the statute."

However, before the tax was collected, the legislature did repeal it and provided, that this tax instead of being collected as county taxes could only be collected as follows:

The prosecuting attorney, upon the request of the county court, which request shall be of record, such court being first satisfied that there exists a necessity for the assessment, shall present a petition to the circuit court, and the circuit court upon being satisfied of the necessity for such tax and that it will not be in conflict with the constitution and laws of the state, shall make an order directing the county court to levy the tax. This court held

that the circumlocution through which the plaintiff must go, was not in conformity to the terms of his contract, which provided that he should have a special tax for the payment of the principal and interest due him, to be levied from time to time *in the same manner* as county taxes.

Mr. Justice Matthews, in delivering the opinion, says, "It may, therefore, be considered as a most material and important part of the contract contained in the act, not perhaps, that the creditor shall always have a right to have taxes for his benefit collected in the same manner in which county taxes were collectible at that date, but that he shall at least always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time may be levied and collected." The court here plainly recognizes the principle that the remedy provided by law is distinct from the remedy provided by contract.

Hill vs. Merchant's Ins. Co., 134 U. S., 315, A. D. 1889, is next decided. Mr. Justice Harlan, delivering the opinion, says: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract," citing *Bronson vs. Kinzie.*

McGahey vs. State, 135 U. S. 662, A D. 1889, is next decided. Mr. Justice Bradley, delivering the opinion, says: "In the language of Chief Justice Waite, in *Terry vs. Anderson*, 95 U. S. 628, the parties to a contract have no more a vested interest in a particular limitation which has been fixed than *they have in an unrestricted right to*

sue." "In all such cases the question is one of reasonableness * * * * of that the legislature is primarily the judge and we cannot overrule the decision of that department of the government unless a palpable error has been committed."

In *Wheeler vs. Jackson*, 137 U. S. 245, A. D. 1890, the act was in the nature of a limitation act.

Mr. Justice Harlan, in delivering the opinion of the court held the act constitutional, and said: "But whatever may have been the reason that induced the enactment of the statute of 1885, the period within which actions must be brought was a matter resting primarily with the legislative department of the state government, and as statutes of limitation have for their object and are deemed necessary to the repose and security of society, the determination of that department should not be interfered with by the courts." * * * * *

Morley vs. The Lake Shore R. R. Co., 146 U. S. 162, A. D. 1892, is next decided. This was an act that changed the rate of interest allowed on judgments, past or future, from ten to eight per centum.

Mr. Justice Shiras, delivering the opinion, says: "After the cause of action, whether a tort or a broken contract not itself prescribing interest *till payment* shall have been merged into a judgment; whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so

far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue," * * * and speaking of the duty of the debtor to pay it, "but such duty is created by the statute and not by the agreement of the parties. (Italics ours.)

"The well settled rule, that on a suit on this New York judgment in another state, the interest recoverable is that allowed by the latter, points to the conclusion that such interest is in the nature of damages and does not arise out of any contract between the parties, as is said by Chief Justice Marshall in *Ogden vs. Saunders*, "if the law becomes a part of the contract, change of place would not expunge the conditions. A contract made in New York would be the same in any other state as in New York and would still retain the stipulation originally introduced into it."

This citation approved here by this Court shows conclusively that it distinctly repudiates the idea that the remedy enters into the contract.

But counsel say on page 39 of their brief that the reasoning quoted with approval by this Court from *Ogden vs Saunders* "is weak." Well, it is

hard to answer that. If it is weak, we cannot undertake the task of making it stronger than the names of the men that support it do, names that are household words almost everywhere our language is spoken.

U. S. ex rel. vs. Thoman, decided 1895 is next. Iin this case, Mr. Justice White said, relator had no contractual right in the act repealed.

New Orleans & C. R. R. Co. vs. Louisiana, decided March 4th, 1895, 157 U. S. 219. In this case the act in question gave the right of mandamus against railroad corporations in behalf of municipal corporations to compel the former to pave, repair, construct and reconstruct streets, bridges, culverts, etc., where required by the terms of their franchise, and the act by its terms applied to all franchises heretofore or hereafter granted. Mr. Justice Harlan, delivering the opinion of the court, says: "Modes of procedure in the courts of a state, are so far within its control that a particular remedy existing at the time of the making of a contract, may be abrogated altogether, without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away." Citing *Bronson vs. Kinzie*, *U. S. vs. Quincy*, *Connecticut Mutual vs. Cushman*, *and McGahey vs. Virginia*.

We have now cited every case decided by the Supreme Court of the United States involving the question at issue in this case, and feel no hesitancy in saying that they unqualifiedly hold that the remedy provided by law is no part of the contract.

All the foregoing decisions obviously lead to the conclusions so well stated by Judge Cooley in his work on Constitutional Limitations, 5th Ed., page 345, "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract, and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of Justice as it existed at the time the contract was made, 'Laws changing remedies * * * or abolishing one remedy where two or more existed, may be perfectly valid even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy.'

Page 349. "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

Page 155. "But what is for the public good * * * are questions which the legislature must decide upon its own judgment and in respect to which it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful." Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions, which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives.

Page 350. "Nor is there any constitutional objection to such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemption to any extent as shall not take away or substantially impair the remedy; nor to the modification being made applicable to contracts previously entered into." "Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity." "It must reside in every state to enable it to secure its citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary to the existence and well-being of every community."

Potter's Dwarris on Statutes and Constitutions states the law to be, page 471—1st Edition:

"It cannot be denied that the legislatures have power to pass an act, which, without acting directly on its terms, destroys the remedy which a party may have at the time of its passage, or so embarrases it, that the right of the creditor under such legal remedies are substantially defeated," and again; "But it is well established law, that the individual citizen with all his rights to protection, has no vested right in what is known in the law as remedies, nor in any particular existing remedy. He has no such vested interest in the existing laws of the state, as precludes their amendment or repeal by the legislature; nor is there any

implied obligation on the part of the state to protect its citizens against *incidental* injury occasioned by changes in the law."

Black's Constitutional Law, Sec. 196, page 538, edition 1895, says, "There is a distinction between the obligation of a contract and the remedy for its enforcement; whatever pertains merely to the remedy may be changed or modified, at the discretion of the legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement. "It is not of the obligation of the contract that the remedy shall remain the same as it was when the contract was made."

Andrew's Manual of the Constitution, page 157 says "The spirit of the provision is this, a contract which is legally binding upon the parties at the time and place it is entered into by them, shall remain so, any laws of the state to the contrary notwithstanding." Tiffany Constitution, page 217.

For a full, able and conclusive exposition of this question, see 1887 edition of Black's Constitutional Prohibitions, pages 159 to 185, and Sedg. St. and Const. Law, 539.

We think that the foregoing digest of the decisions of the Supreme Court of the United States, and quotations from the ablest writers on this question, show beyond the shadow of a doubt that the opinion in this case is a correct exposition of the law as applied to the facts in this case.

STATE DECISIONS.

All the states have passed on this question, and without exception have held such laws constitutional where the mortgage contract is construed as it is in Kansas.

In a few of these states the attention of the courts not having been called to the distinction between the *Bronson vs. Kinzie* mortgage contract and the more modern instrument, the courts in the first instance held the act unconstitutional, but in every instance that we have been able to discover, subsequently overruled these former decisions and held the law constitutional. We will not burden the court with an extended examination of these state cases but simply cite a few of them, as follows:

Bruce vs. Schuler, 9 Ill. 221.

Evans vs. Montgomery, 3 Watts and Serg. 218.

Foster vs. Essex, 16 Mass. 245.

Root vs. McGrew, 3 Kansas 215.

Huntzigher vs. Brock, 3 Grants cases 243.

Read vs. Black, 23 Maine 318.

Cusic vs. Douglass, 3 Kansas 123.

Moorse vs. Goold, 11 N. Y. 281.

Rockwell vs. Hubbel, 2 Doug. (Mich.) 187.

Parmenter vs. State, 135 N. Y. Ct. of Ap-

peals 154, in which Mr Justice Peckham cites approvingly *Terry vs. Anderson*.

Hershfield vs. Popp, 145 N. Y. Ct. of Appeals, 97.

Mills vs. Husson, 140 N. Y. Ct. of Appeals, 99.

Moore vs. Martin, 38 Cal. 439.

Hayward vs. Judd, 4 Minn. 487.

Robertson vs. Van Cleave, 129 Ind. 229.

Holland vs. Dickenson, 41 Iowa 367.

Fonda vs. Clark, 43 Iowa 300.

Loan Assn. vs. Hardy, (Tex.) 26 S. W. Rep. 497.

Davis vs. Rupe, 114 Ind. 588.

Ins. Co. vs. Brouse, 83 Ind. 62.

Babcock vs. Gurney, 42 Iowa 156.

Olmstead vs. Kellogg, 47 Iowa 460.

Iverson vs. Shorter, 9 Ala. 113.

Ins. Co. vs. Neeves, 46 Wis. 147.

People vs. Livingston, 6 Wend., 526.

Cook vs. Grey, 2 Houst., 455.

Chadwick vs. Moore, 8 Watts and Serg., 49.

Berthold vs. Fox, 13 Minn., 501.

Farnsworth vs. Vance, 2 Cold., 108.

Butler vs. Palmer, 1 Hill, 324.

State ex rel vs. Sears, (Oregon) 43 Pac. Rep., 482, February, 1896.

State of Montana ex rel Bank vs. Alexander P. Gilliam, sheriff, March 16th, 1896, (not reported), in which the court, after quoting Chief Justice Martin in this case and *State vs. Sears, supra*, says, "Cordially concurring, as we do, with the decisions of the Kansas and Oregon courts, and finding our reasons for such concurrence in the same United States Supreme Court cases discussed by them, and they having so thoroughly occupied the field before we reached it, it would seem to be an affectation of original research to write at much length in this opinion."

COMITY OF FEDERAL COURTS—CONSTITUTIONALITY PRESUMED.

This court has repeatedly announced, that the "Federal Courts" will lean toward an agreement with the decisions of the state courts, in the matter of the construction of their statutes.

Burgess vs. Seligman, 107 U. S., 33.

Anderson vs. Santa Anna Tp., 116 U. S., 359.

Morton vs. Shelby, 118 U. S., 425.

And as said by Chief Justice Waite in *Munn. vs. Illinois*, 4 Otto., 113: "Every statute is pre-

sumed to be constitutional." "The courts ought not to declare one unconstitutional unless it is clearly so."

SECTION 24 OF THE ACT OF 1893.

Section 24 of the Act of 1893 has been the subject of some criticism, "but no question arises under that section in this case, for the record does not show that any receiver was ever appointed or applied for under that section."

Beverly vs. Barnitz, 55 Kansas, 488.

We can see no good reason why this section should not stand; it is simply declaratory of the common law, which gives the debtor the right of possession and the rents and profits until the sale is fully consummated by the execution and delivery of a deed, and it has always been considered a very essential element of the right of redemption, that the debtor should have the possession of the property and the income thereof, the more readily to consummate his efforts to redeem; the appointment of a receiver is only an incident of this right, given by this section for the better protection of the creditor.

Wiltsie on Mortgage Foreclosure, section 583, page 702.

Ridgeway vs. Bank, 78 Ind, 119.

4 Kent., 157-161.

Woods vs. Hildebrand, 46 Mo., 284.

Hill vs. Lord Bexley, 20 Beav., 127.
Gale vs. Parks, 58 Ind., 117.
Rockwell vs. Servant, 63 Ill., 424.
O'Brien vs. Fry, 82 Ill., 87 and 274.
Gilman vs. Tel. Co., 91 U. S., 603.
Taliaferro vs. Gay, 78 Kty., 496.
Kountze vs. Hotel Co., 107 U. S., 378.

CONCLUSIONS.

We believe we have established beyond controversy the following propositions:

1. That the remedy given by the legislature does not enter into contracts and become part of the obligation thereof; it, therefore, follows that such legislation may be changed as the wisdom of the legislature may direct without impairing the obligation of the contract.

2. That there are two classes of remedies.

One provided by the legislature as instanced in the seizure and sale of the debtors's property.

The other provided in the contract of the parties as in the usual form of trust deeds, where the trustee may advertise, sell and convey the absolute title to the debtor's property without the intervention of the courts.

The latter right cannot be taken away by subsequent legislation, as it is part of the contract of the parties, "for the theory which allows the state to modify its modes of procedure and remedial

process rests entirely on the fact that the remedy is no part of the obligation; but this plainly ceases to be true when the parties have chosen to make such modes and process an express ingredient of their contract." Black Constitutional Prohibitions, Sec. 149.

3. All decisions of the Supreme Court of the United States, however divergent and incompatible the various views expressed may on their face appear to be, they are in reality in no sort of conflict whatever, and an examination of the cases will prove that where the court held that the remedy entered into the contract, that language as applied to the facts in those particular cases was correct, as there it will be found that the remedy was provided in and by the contract itself, with the two possible exceptions of *Edwards vs. Kersey*, and *Walker vs. Whitehead*, *supra*, where all remedy was taken away, and in such cases it might be said that the court proceeded on the theory that there was an implied right to some remedy, and on this theory the right to enforce the contract by *legal process* may enter into it and become a part of it.

4. That under the construction of the mortgage contract in this state there is no remedy given by the terms of the contract, therefore the creditor must take such remedy as the legislature may provide, and which may be in force at the time he seeks it, and in exactly the same manner as he would be compelled to pursue the remedy provided,

if his action was to enforce a "Mechanics lien" or an "action of attachment."

5. That the law of 1893 simply prescribes the rights of the mortgagor and the purchaser after the sale, and in no respect impairs the obligation of the mortgage contract as between the mortgagor and the mortgagee. That this change in the procedure may *incidently* deter bidders or lessen the probable amount that might be bid at the sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never arise, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract. See Mr. Justice Harlan in *Conn. Mut. Life Ins. Co. vs. Cushman*, *supra*.

6. That there are a few cases that apply the test of reasonableness, as *Gilfillan vs. Union Canal Co.*, *Tenn. vs. Snead* and *McGahey vs. State*, *supra*, and from a sentimental standpoint, these views may seem correct, yet on principle we think they are not from a strictly legal view exactly correct. The constitution simply provides that the states shall not pass a law impairing the obligation of contracts, and as said by Judge Cooley in his work on Constitutional Limitations, page 349, "the courts cannot enforce any *implied restrictions*, except where the act is clearly evasive;" therefore as the remedy is no part of the obligation, except the change in the remedy, is clearly evasive and passed for the purpose of preventing the payment of the debt, the act does not come within the pro-

hibition. The line must be drawn somewhere; shall it be where Marshall, Story, Webster and the other cotemporaries of the constitution drew it, or shall it be an undefined line, which this Court must settle anew every time the question arises?

7. However, should we accept this test of reasonableness as governing in this case, there can be no doubt that the legislature never intended to discharge a debtor without payment, and the act cannot have that effect. It seems a fair test of the reasonableness of this act, to compare it with similar acts now in force in other and particularly older states, where land values are settled and prices of land are not subject to such violent fluctuations. We find the time given for redemption in most of the other states is greater than given by this act: In Arkansas, Indiana, Iowa, Louisiana, Maryland, Minnesota, Missouri, Pennsylvania, Illinois and New Hampshire, one year; in Tennessee, two years; Maine and Massachusetts, the home of capital, three years; Georgia, if possession given mortgagee, ten years; New York and Utah in the discretion of the court, and Kansas under this law six to twelve months to the mortgagor and three to six months additional to his creditors.

8. If the position assumed by opposing counsel is held to be correct, the states of this Union would become mere dependencies, without ability to pass laws or exercise the powers of government, and this is true for the reason that there is no law the legislature can enact, that does not directly, or in-

directly effect some contracts either beneficially or otherwise. It cannot for a moment be presumed that the states ever intended, or had they supposed that such a construction would have been put upon this language, would ever have consented to the adoption of this clause of the constitution and the surrendering of these powers, which were absolutely necessary to the carrying out of the scheme of government, devised by the wisdom and intelligence of the framers of that instrument.

And, as said by Mr. Justice Daniel, in *Curran vs. Arkansas*, 15 Howard 304:

"Such a claim of power in the Federal government would justify the interference with, and the supervision by this Court of any act of the state legislatures, and of every transaction of private life, and in the necessary imperfect attempts to exercise such a power, would encumber it with a mass of business, which would disappoint and entirely prevent the performance of its legitimate duties."

And, Mr. Justice Brewer, in his remarks before the American Bar Association last year struck the keynote of this question when he said "thoughtful men more and more, see that the wise thing is to cast upon each community full responsibility for the management of its local affairs, and that the great danger of free government is in the centralization of power."

We are all too proud of being citizens of the greatest nation on earth, to detract from its glory by weakening the power of the separate entities which compose it and constitute its glory, as the

limbs to the human body; as the stars to a constellation, so are these states to the Union.

9. That the decision of the Supreme Court of Kansas, in the opinion written by Chief Justice Martin in this case, is clearly the law.

That the position taken by Mr. Justice Allen in his dissenting opinion in *Watkins vs. Glenn*, 55 Kansas, 417, is unquestionably correct on principle, and his reasoning unanswerable, and in his language, we say, "It seems that a statute so eminently fair and reasonable in its main features and provisions, and which affords in most instances, an even better remedy for creditors than was before afforded, ought to be upheld. That the legislature has not, by modifying the remedy, materially impaired the obligation of contracts, and that the law should be followed in all cases whether the obligation was created before or after its passage."

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney for Defendant in Error.

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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*
No. 863.

REPLY BRIEF OF PLAINTIFF IN ERROR.

D. M. VALENTINE,
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Of Counsel.

LEONARD S. FERRY,
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CRANE & CO., TOPEKA.

No. 16,153.

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

MARTHA BARNITZ, *Plaintiff in Error*,
vs.
JOHN L. BEVERLY, *Defendant in Error.* } No. 863.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

A large portion of the briefs of counsel for the defendant in error is devoted to the doctrine of equitable redemption, claiming that the redemption act of Kansas of 1893 is only a regulation, or at most only an extension, of that doctrine or of the right founded upon it; but that doctrine cannot have any application to this case for the following reasons: 1. Prior to the passage of said act we had no mortgage redemption law of any kind in Kansas. 2. The facts of this case do not bring the case within any such doctrine even if the doctrine had existence in Kansas. It is true

that in Kansas after default and prior to a foreclosure sale the mortgagor has a right similar to the right of redemption in equity. The two rights are alike in the following respects: The mortgagor in either case may have the mortgaged property wholly released from the mortgage debt and the mortgage by paying the *full amount* of the mortgage debt, with interest and costs. Under our laws this payment and release cannot fairly be called a redemption. The mortgagor by his default has lost nothing. A mortgage in Kansas to this extent is unlike a common-law mortgage. The mortgagor by his default has not forfeited his title to the land nor his right to the possession thereof, and there is nothing to redeem. His right to pay the mortgage debt and release his property from the mortgage is a purely legal right, and not merely an equitable right as the right of redemption in equity is. After the foreclosure sale, and independent of the said statute, the mortgagor in Kansas has no right of redemption of any kind either in law or in equity, and no right even to pay the mortgage debt and have his land released from the mortgage either in law or in equity. The right of redemption in equity, as known in other States, often extends

beyond the time of a foreclosure sale, and in such a case the mortgagor by doing equity may redeem his property from the mortgage debt and the sale; but in all cases, either before or after sale, the mortgagor, in order to effect a redemption, must pay the *full amount* of the mortgage debt, with interest and costs. This the defendant in error under the statute does not propose to do. He proposes to pay only a portion of the mortgage debt — only the amount for which the property was sold, with interest, taxes, and costs — and by such payment to so redeem his property that it can never again be used in payment or part payment of the remainder of the mortgage debt. (Redemption Act of 1893, sections 1, 2, 23.) Some of the cases showing that a mortgagor in order to redeem his land in equity must pay the full amount of the mortgage debt, with interest and costs, will be found cited in a note to section 1075 of Jones on Mortgages. See also the case of *Collins v. Riggs*, 14 Wallace, 491. The syllabus of the case reads as follows:

"1. To redeem property which has been sold under a mortgage, it is not sufficient to tender the amount of the sale where it is less than the mortgage debt. The whole mortgage debt must be tendered or paid into court.

"2. Such money will be subject to distribution between the mortgagee and the purchaser at the mortgage sale in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt."

Now certainly a statute attempting to authorize a redemption of property from pre-existing mortgages by the payment of only a portion of the mortgage debt is necessarily void. There are cases where, at a foreclosure sale under statutes relating to pre-existing mortgages, the mortgaged property sells for a sufficient amount to pay the whole of the mortgage debt, with interest and costs, and the mortgagee is paid such amount. Such statutes have in some of such cases been sustained, whether rightly or wrongly; but in no case where the property sells for less than the amount of the mortgage debt with interest and costs should such a statute be sustained, and such a statute certainly cannot rightfully be sustained in Kansas.

II.

Although all the rights of Mrs. Barnitz in her various capacities of mortgagee, party plaintiff in the foreclosure suit, judgment creditor in such suit, purchaser at the foreclosure sale, which sale

has been confirmed, party defendant in error in the State Supreme Court, and now a party plaintiff in error in the United States Supreme Court, are all united and vested in one and the same person, Mrs. Barnitz, yet it is claimed in the briefs of defendant in error that she has no right now to complain of the said statute or of any decision of the State Supreme Court sustaining such statute. But as Beverly took the case from the State district court, where Mrs. Barnitz was successful, to the State Supreme Court, and made her a party defendant there, had she not a right in that court as against any unconstitutional enactment to defend and protect all her rights and interests resulting in any manner directly or indirectly from her original mortgage contract and the law, and may she not now complain of any and all errors committed by the State Supreme Court prejudicial to any of her said rights and interests? We think we have shown that as a mortgagee and under her original mortgage contract she had the right, if a foreclosure sale became necessary and actually took place, to have the mortgaged property sold absolutely and entirely, and so sold that upon the confirmation of

the sale a sheriff's deed would be immediately executed, conveying to the purchaser the whole of the mortgagor's interest, and a full and complete title paramount to any and all intervening titles, interests or incumbrances brought into existence after the execution of the mortgage and before the execution of the sheriff's deed. And if Mrs. Barnitz as mortgagee had the right to have the property so sold, then did not any person, including Mrs. Barnitz, have the right to purchase the property upon the same terms? Will it be claimed that although Mrs. Barnitz as mortgagee had the right to have the property sold and a sheriff's deed therefor immediately executed and the possession of the property immediately given to the purchaser, yet that no person had a right to purchase the property upon any such terms? Are the interests to be purchased at a foreclosure sale any less extensive or comprehensive than the interests to be sold? Are they not substantially equal and the same? And if any person had the right to purchase upon the foregoing terms, then certainly Mrs. Barnitz had such right, and did so purchase, and she now has the right to such deed and posses-

sion; and as she has not obtained the same, has she not the right now to complain of the errors of the Supreme Court of Kansas in depriving her of the same, and to thus complain not merely as a mortgagee and a party to the suit, but also as a purchaser of the property so sold at the foreclosure sale? Mrs. Barnitz now has not only all the rights of a purchaser, but also all the rights of a mortgagee, a judgment creditor, and a party to the suit. All rights as mortgagee, party to the suit, judgment creditor and purchaser are now united and vested in her; and if she is now to be deprived of any of such rights, then it is simply because the said statute and the said decision of the Supreme Court of Kansas have in effect annulled or greatly lessened and impaired the efficacy of her original mortgage contract, which contract, construed in connection with the statutes in force when it was made, would make the sale as good, as effective and as far-reaching as she now claims, and give to her all that she now claims. If all the rights to the deed and to the property which she now claims could not be procured by a purchase at the foreclosure sale, and the confirmation of such sale, then it is because such

rights could not be sold or transferred by such sale and confirmation; and if what she now claims could not be sold or transferred by such sale and confirmation, then it is because her mortgage contract has been greatly lessened in efficacy, diminished in force, and impaired by the statute and the decision of the Supreme Court of Kansas. Indeed Mrs. Barnitz, in whatever character or capacity we may consider her, cannot be deprived of what she now claims upon any other theory than that the obligation of her contract has been greatly impaired. Under her original mortgage contract, considered in connection with the laws of the State as they existed when the contract was made, she had the right to bid at the foreclosure sale, and to purchase the entire property at such sale provided she was the highest bidder, and have the sale immediately confirmed and a sheriff's deed immediately executed conveying absolutely to her the property, and she be placed in the immediate possession thereof; or if the property should be sold to some one else and the sale confirmed, then she would have been entitled to immediately receive the purchase-money; but under the new enactment she could

not obtain either the land or the purchase-money. She could not obtain the purchase-money, for the land would not sell to anyone else except at a great sacrifice, and in order to prevent a greater loss she was compelled to purchase the land herself; and now, under the act of 1893, she cannot enforce either the delivery of the land to her or the payment of any portion of the redemption money for eighteen months. The owner of the land under that enactment is entitled to hold the possession of the land for eighteen months more without paying anything. Is Mrs. Barnitz, notwithstanding her multifarious capacities, wholly remediless? Is it possible that a statute may at any time be passed in violation of the constitution of the United States, impairing the obligation of a mortgage contract, rendering the already inadequate security for the mortgage debt still more inadequate, compelling the mortgagee, with a hope of lessening his loss, to purchase the mortgaged property at the foreclosure sale, and still there be no one, not the mortgagee nor the judgment creditor nor the purchaser, nor any party to the suit, nor all combined, having any remedy as against or power to avert the evils and losses resulting

from this unconstitutional enactment? Must all the losing parties suffer in uncomplaining silence?

Respectfully submitted.

Leonard D. Fiero

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Supreme Court of the United States.

863

MARTHA BARNITZ, PLAINTIFF IN ERROR,

vs.

JOHN L. BEVERLY, DEFENDANT IN ERROR.

MOTION TO SET ASIDE ORDER OF JANUARY 27th, 1896, AND TO PERMIT ORAL ARGUMENT.

WILLIAM J. SCOTT,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

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MARTHA BARNITZ, PLAINTIFF IN ERROR,

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WILLIAM J. SCOTT,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

MARTHA BARNITZ, PLAINTIFF IN ERROR,

vs.

JOHN L. BEVERLY, DEFENDANT IN ERROR.

Motion to Vacate Order of January 27, 1896, Providing for Submission on Briefs, and Motion to Permit Oral Argument.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA, TO OCTOBER TERM, 1895, FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MARTHA BARNITZ, *Plaintiff in Error,*
vs.
JOHN L. BEVERLY, *Defendant in Error.*

Now comes defendant in error, John L. Beverly, and moves this Honorable Court to vacate the order in this cause hereinbefore made to submit this cause without oral argument for the following reasons, to wit:

I. That said cause is of great importance, not only to defendant in error, but to many of the citizens of the State of Kansas, involving in the aggregate to citizens of said State the sum of at least two hundred million dollars.

II. That E. A. McMath, who claimed to represent defendant in error and who, it is claimed, telegraphed the attor-

neys for plaintiff in error, agreeing to submit said cause in this Court, was not employed by defendant in error to represent him in this Court and had no authority whatever to make any agreements waiving oral argument or otherwise.

III. That, as defendant in error is informed and believes, said E. A. McMath is not a member of the bar of this Honorable Court and had no authority to appear in this Court, either personally or by stipulation, and make any agreement waiving any of the rights of the defendant in error herein.

IV. That while defendant in error is willing to have this case heard at as early a date as will suit the convenience of this Honorable Court, yet on account of the importance of this case and the large amount involved he is not willing to submit this case without oral argument.

Wherefore he prays the Court to set aside the order dispensing with oral arguments and the setting of said cause for hearing at such time as this Court can conveniently hear counsel on the issues involved.

JOHN L. BEVERLY.

WILLIAM J. SCOTT,
His Attorney.

STATE OF KANSAS,
County of Shawnee, } ss:

John L. Beverly, being first duly sworn, upon his oath says that the matters and things set forth in the foregoing motion are true, except those matters set forth therein as made on information and belief, and as to such matters affiant says that he believes they are true.

JOHN L. BEVERLY.

Subscribed and sworn to before me, W. F. Monteith, a notary public, this 13th day of February, 1896.

[SEAL.] W. F. MONTEITH,
Notary Public.

My commission expires April 26, 1896.

TOPEKA, KANSAS, *March* 2, 1896.

Copy of within motion and notice that the same would be presented to the Supreme Court of the United States on Monday, March 9, 1896, at 10 a. m., or as soon thereafter as counsel can be heard, served on us March 2, 1896.

FERRY & DORAN,
Attorneys for Plaintiff in Error.

THE MATTER INVOLVED.

The question at issue is, Does the remedy provided by law for the enforcement of contracts enter into them and become their obligation, and therefore does a subsequent law changing the remedy come within the prohibition in section 10, article 1, of the Federal Constitution, the new law not changing in any manner any of the terms of the mortgage contract in question in this case?

REASONS FOR THE MOTION.

We ask the Court to sustain this motion for the following reasons:

1. That there is involved in this case the right of redemption of the homes of the poor debtors of the State of Kansas to the extent of at least two hundred millions of dollars.

2. That the majority of the supreme court of Kansas in this case first decided the law unconstitutional as applied to pre-existing mortgages, the case having then been submitted on

printed brief, without oral argument. On a motion for rehearing—printed briefs being filed and the motion also being argued orally—a patent error in the former opinion as to the effect of the law repealing a former law and the distinction between the rights acquired by the mortgagee under a Kansas mortgage and those acquired under the common-law mortgage, instanced in the case of Bronson *vs.* Kinzie, 1 Howard, 311, and the late cases of Bank *vs.* Franklin, 120 U. S., 747; Morley *vs.* The Lake Shore R. R. Co., 146 U. S., 162, and New Orleans, etc., R. R. Co. *vs.* Louisiana, No. 11, U. S. Sup. Ct. Reporter, 629 (advance sheets), April 15, 1895, 157 U. S., 219, being fully called to the attention of that court. After over four months' consideration, in what is conceded to be one of the ablest opinions handed down by that court, the court sustained the constitutionality of the law and gave conclusive reasons for reversing their former decision.

See Beverly *vs.* Barnitz. 55 Kansas, 466.
42 Pacific Reporter, 725.

3. While we are thoroughly satisfied that on principle and following the spirit and letter of its own decisions from Sturgis *vs.* Croninshield and Ogden *vs.* Saunders down, this Court will affirm the decision of the supreme court of Kansas, yet we are especially anxious that this question should be finally settled by an unanimous Court, and to that end we think a full discussion of the question involved is absolutely necessary, for the reason that an honorable member of this Court has formed and expressed an opinion which we think is contrary to the expressed opinion of nearly every other member of this Court. We think that opinion was formed without a full consideration of the questions involved, and was more the result of early associations as the counsel and representative of the largest life insurance company in the Northwest than as the result of an extended examination of the authorities.

For these reasons we think we ought to have an opportunity to present this case as fully as we are capable of doing, and by oral argument, to the consideration of this Court.

We have been informed, though not officially, that Mr. Justice Brewer, on account of his relations as trustee of the Northwestern Mutual Life Insurance Company, would not sit in the hearing of this case, as that company has several hundred thousands of dollars in foreclosures, the proceedings in which will be affected by the decision of this case. We hope this statement is erroneous, as we desire an opportunity orally to convince his honor Mr. Justice Brewer that the supreme court of Kansas in its last decision correctly states the law, and we hope that decision will be sustained by the full bench of this honorable Court.

4. As to the unfortunate error by which a stipulation was filed in this Court by W. C. Oliver, Esq., waiving notice of the filing of a motion to advance and agreeing to submit this case on briefs, we only care to say that E. A. McMath, Esq., then of Topeka, represented the defendant in error at the time of the decision adverse to the law in the supreme court of Kansas. After that decision we wrote Mr. McMath requesting him to file a motion for rehearing, which he did. At this time he had moved from Kansas to Texas and writes from that State asking us to take charge of the case, and in reply to our letter asking if he would not assist in arguing motion or printing brief he writes, June 14, 1895:

"I am not well, and am so involved in business, which takes all the attention I can give, that it looks now as though I shall be utterly unable to prepare any brief at all for the July term. I will send you my copy of opinion, * * * and would be pleased to have you file brief or argue motion, if you can do so, independently of me."

And on June 27, 1895, he again wrote, abandoning the case. With the consent and approval of Beverly and rep-

resenting other large cases in which this question was involved, we went to great expense in briefing and presenting this case on rehearing (pages 25 and 26, printed Record), and did not hear a single word from Mr. McMath or any claim of his being connected with the case until this stipulation is suddenly introduced into this case. The gentlemen representing plaintiff in error were present when the motion for rehearing was argued, were told that we represented the defendant in error, and well knew Mr. McMath had removed to Texas months before. Under such circumstances it seems strange indeed that all their communications were with Mr. McMath, who was over five hundred miles away. Mr. McMath is not a member of this bar, and neither the defendant in error nor his attorneys had any communication with W. C. Oliver, Esq.

WILLIAM J. SCOTT,
Attorney for Defendant in Error.